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Dedicated, with fond memories, to Kevin Williams,
David Royall and Colin Perkin

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Editorial

We are pleased to publish the first issue of the twenty-sixth volume of the *Coventry Law Journal*. As with previous issues, this issue contains articles, recent developments, case notes and student essays on a wide variety of legal areas, such as human rights, criminal justice, discrimination law, commercial law, arbitration, employment law, legal history, tort, corporate and company law and property law. Our thanks go to those staff and students who have contributed their research and time to this issue. We are especially pleased to include contributions from outside the school; by Dr Liz Hales, who has written an article on care of young children in the criminal justice system, and (another) Steve Foster, from Manchester Grammar School, who has written on possible future reform of the Human Rights Act.

We are also pleased to include contributions from past and present students, both at Coventry and at SWUPL, our partner university in China. The Law School encourages student work and writing, and we have included a number of student articles, essays and case notes in this issue.

This issue is dedicated to three former colleagues in the Law School who have sadly passed away since the publication of the last issue of the Journal. It is difficult to describe the level of commitment that Kevin Williams, David Royall, and Colin Perkin gave to the Law School in addition to their individual contribution to the university and legal education in general. Collectively, they gave over seventy-five years' service to Lanchester Polytechnic, Coventry Polytechnic and Coventry University, and each will be fondly remembered and missed terribly, as former colleagues and as friends. A special feature on each of these exceptional teachers is included in this issue.

We are bidding farewell and good luck to two staff members: Dr Luke Graham, who has secured a post at Manchester University, and Dr Emma Marchant, who is returning to the University of Birmingham. Both have made significant contributions at Coventry and we would like to thank them for all their hard work and inspiration.

We hope you enjoy reading this issue and we look forward to your contributions in future issues. If you wish to contribute to the Journal and want any advice or assistance in being published, then please contact the editors: the next publication date is December 2021, which will coincide with our twenty-fifth anniversary celebrations, and contributions need to be forwarded by early November. The Law School will host a conference in October of this year to celebrate twenty-five years of the Journal, inviting previous contributors to recall their academic pieces and report on any changes to the law since initial publication. The December 2021 issue will include some of those contributions together with new pieces.

The editors: Dr Steve Foster and Dr Stuart MacLennan

SPECIAL FEATURE

Kevin Williams

David Royall

Colin Perkin

Law Lecturers and friends of the Law School

In a previous issue of the Journal, we marked the passing of one of the Law School's legends – Chris Poole who taught in the School for over 20 years. In this issue, it is with great sadness, but with enormous gratitude to each of them, that we dedicate this issue to three of my former colleagues, who have passed away since the publication of our last issue of the Journal.

All three were *in situ* when I arrived at Lanchester Polytechnic in 1977 as a fresh-faced and very green lecturer in law. All three were already established as lecturers and academics and David Royall was Head of the Department of Legal Studies and editor of the *Law Teacher*. It is impossible to explain fully the impact all three had on my career (and the careers of thousands of students and colleagues over the years). Kevin was a serious intellectual, but a keen socialite and host and known as Peter Pan because of his youthful looks, which he retained until the end. David was serious and responsible, but with a welcoming nature and wry sense of humour: an outstanding teacher and academic and a willing mentor to new staff. Colin was Colin: charming, friendly and capable of both very serious debate and child-like humour.

I got to know each of them very well over the years, and they each inspired me as an academic and human being. David I continued to see in Leamington and at car boots; Kevin became a close friend (spilling red wine on my carpet on endless occasions); and I was fortunate enough to live close by to Colin for thirty years. Yet it is as outstanding lecturers and academic colleagues that they will be remembered in legal circles and for which they will be celebrated in this tribute.

Kevin Williams

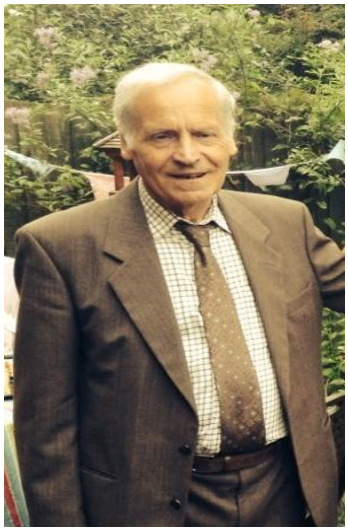
Kevin Williams joined the Department of Legal Studies at Lanchester Polytechnic in 1970 where he taught for 20 years before moving to Sheffield Hallam University in 1990. Kevin was an exceptionally articulate and enthusiastic lecturer who was adored by his students and highly regarded by his colleagues and fellow academics. He taught employment law at a time of great industrial and political upheaval, and famously taught tort on the undergraduate programme, both at Coventry and at Sheffield.

Kevin was a keen intellectual and academic, publishing widely in the areas or negligence and compensation culture, defamation law and many area of employment law (notably transfer of undertakings). His style was so expert and concise, that many legal skills' texts used his articles as exemplars of academic writing. This came through in his lectures: a superb blend of academic rigour, sociability, ribald comments and humorous anecdotes – all done whilst rolling and smoking his cigarettes with the trademark liquorice papers.

A (very) keen Manchester United Supporter and social animal, Kevin was always at the heart of staff and student parties, chatting and dancing away long after (younger) people had retired. He was a joy to know and everyone who taught with him benefitted from his expertise, wisdom and healthy approach to life.

In a golden period of law lecturing, he was at the very top, and we will miss him very much.

David Royall



David joined the Law Department of what was then Lanchester Polytechnic in the late-1960's, and in 1977 became Acting Head of the Department, deputising for Professor Frank who had died earlier in the year. Along with Nigel Bastin, David was at the heart of the Department and its progress post-Frank and went onto to become full-time Head shortly after.

Being in charge of a largely youthful staff who were teaching at an exciting time in legal education, David used his experience as a teacher and writer, and as a leading light in legal education (and reviewer in the *Law Teacher)* to make the Department a leader in legal education and student care. Under his leadership, Lanchester continued its innovation in delivering the BA Business Law programme - a course that allowed students to blend a knowledge of the law in general, commercial law in particular, and commercial and financial awareness. This programme allowed hundreds of students to graduate with well-developed and keen legal and employment skills, and many of those graduates went on to become leading figures in law, industry and management.

As a teacher David led by example, delivering criminal law, employment law, company Law and taxation with expertise and skill, blending his deep knowledge of the subjects with academic commentary and tales delivered with his inimitable dry wit. David's legacy is the teaching and pastoral excellence for which Coventry University is now renowned.

Many of us owe David a deep gratitude for his work as Head, his encouragement to write, research, and publish, and to offer the highest possible educational service to our students. When he left the Department and higher education, it marked the end of an era, for David was certainly 'old school' in his teaching and management style. Yet many of the qualities that he taught us, and which he employed, are still essential and practiced today; it is just another era.

The comments we received from former colleagues and staff on the news of his passing are evidence of his stature as a teacher and academic. He will be fondly remembered at Coventry University Law School, although his greatest contribution was to the Department of Legal Studies at Lanchester Polytechnic.

Colin Perkin

In 2011, a special issue of the *Coventry Law Journal* was dedicated to Colin's contribution to the area of commercial law and to mark Colin's retirement from the university after over forty years as a student and law lecturer at Coventry.

Colin studied law at Lanchester Polytechnic, gaining (the very first) first-class honours degree in Business Law. After gaining a Master's degree, he returned to the Law Department and taught contract law, company law and commercial law, before taking his family to New Zealand and teaching at Auckland University. He returned to Coventry University in 1990, where he resumed his teaching until his retirement in 2011.

In addition to being a well-regarded academic and writer in his field, Colin will be best remembered for his teaching. Few have any real comprehension of how much preparation went into his classes, but thousands of students benefitted from his hard work, his expertise and his effortless and engaging delivery. I recall when one ex-head of department, completely out of the blue, closed a staff meeting by thanking Colin for his 'immaculate teaching'. I also recall many years ago, when module evaluation questionnaires were first employed, that he rather sheepishly handed me a form, on the back of which was written 'Simply the Best.'

As an academic, Colin was exceptionally astute with an exceptional attention to detail and an engaging writing style (with the most beautiful hand writing I have ever seen). He wrote a text on Contract Law and made regular contributions to the Law Journal

When Colin retired, he was missed by academics and students alike, for his hard work, his sense of humour and, of course, his teaching. Colin was a perfectionist, in his teaching and his academic writing, and all that taught with him loved him dearly and benefitted from his expertise, his patience and his warm sense of humour. Colin and his wife Rosemary enjoyed a happy retirement, travelling and doting on their grandchildren. On his passing, we received dozens of condolences and warm memories of an exceptional man – 'he was one of life's good guys'. He will be sadly missed, but always fondly remembered.

ARTICLES

CRIMINAL JUSTICE

Management of pregnant women and primary carers of young children through the criminal justice system in England and Wales

Dr Liz Hales*

Introduction

The tragic death of an infant following an unsupported birth in a prison cell at HMP and Young Offenders Institute (YOI) Bronzefield,[1] in September 2019, followed nine months later by a stillbirth at HMP and YOI Styal, has focussed attention on the potential vulnerability of pregnant women and their babies in custody. Up until then there had been no stated concern by the Ministry of Justice in relation to the risks of housing pregnant women in the prison estate. Indeed, the first recognition of the potential vulnerability of this cohort was in response to the spread of COVID-19 Pandemic.[2] Prior to these deaths, Prison Service inspection reports of the prisons in the female estate that provide Mother and Baby Unit (MBU) facilities failed to ring alarm bells, indicating that this provision had been 'steadily improving.' The most recent reports identified maternity services as 'impressive' at Bronzefield,[3] and the MBUs in both Peterborough,[4] and New Hall,[5] as 'excellent', with the provision of appropriate antenatal and post-natal care.

In contrast, a report published by Abbott in 2019 on the management of perinatal women in custody painted a very different picture, pointing out that births in cells were not isolated incidences.[6] She identified many worrying failures to provide adequate support to these women, restating some of the basic failures outlined some 13 years earlier by the scoping review carried out by Edge.[7] It is therefore appropriate that resultant enquiries on these deaths focus on whether management of their mothers complied with current Prison Service and healthcare regulations, whether these losses of life were preventable, and on lessons that can be learnt in relation to the future management of pregnant women in custody.[8]

However, the important key question omitted from the resultant enquiries was why these women were in custody at such a critical time in their pregnancies; particularly in relation to the first case where the mother was on remand and thus had not, at the time of birth, been found guilty of a criminal offence. This article attempts to answer this question by looking at how women are processed through the

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* Visiting scholar of the Institute of Criminology and independent researcher and consultant in criminal justice

[1] Young Offender Institutes in the UK hold prisoners between the ages of 18 and 21.

[2] With a stated intent of releasing all pregnant women and mothers (with babies), from Mother and Baby Units, who did not present a risk to the public.

[3] HM Chief Inspector of Prisons (2019) *Unannounced Inspection of HMP and YOI Bronzefield.* Carried out in November to December 2018.

[4] HMP Inspector of Prisons (2019) *Unannounced Inspection of HMP and YOI Peterborough.* Carried out in August-September 2017.

[5] HM Chief Inspector of Prisons (2019) *Unannounced Inspection of HMP New Hall.* Carried out in February – March 2019.

[6] Abbott, l (2019) *The Incarcerated Pregnancy: An Ethnographic Study of Perinatal Women in English Prisons*. NHS research publication.

[7] Edge, D. (2006) *Perinatal Healthcare in Prison.* A Scoping Review of Policy and Provision on behalf of the Prison Health Research Network, Department of Health.

[8] To date, the results of these enquiries have not been published.

criminal justice system - from the point of arrest to release and completion of supervision requirements – and identifying the potential impact of current service provision and decision-making on the women, their pregnancies and the children.[9] It also attempts to move the focus from the impact of sentencing decisions, as evidenced in the *Female Offender Strategy* 2018,[10] the resultant *Women's Policy Framework* 2018,[11] and the JCHR report on *The right to family life: children whose mothers are in prison* 2019,[12] to a wider overall perspective. After looking at the scale of the problem, it then examines the key elements of arrest and initial court appearances, bail applications, sentencing decisions, time in custody, access to Mother and Baby Units (MBUs), the punishing impact of remand in custody, and post release supervision and licence recalls.

To do this, evidence is drawn from relevant publications: data published by the Ministry of Justice, casework data and court observations from previous research and evaluation work of non-governmental organisations carried out in prisons and courts by the author between 2010 and 2019. The intention was also to present a fuller picture of individual case management from data gathered through interviews with women who had or were experiencing custody whilst pregnant, or had given birth in the last two years, and with relevant others involved with management of their cases. However the COVID pandemic meant that gathering such information, particularly in the custodial estate, was no longer feasible.

The scale of the problem

According to the World Prison Brief, England and Wales, together with Scotland, have the highest rates of imprisonment in Western Europe.[13] Barnardos estimate that 200,000 children are affected by this,[14] and there is ample evidence of the damaging impact on their long-term health and well-being, as documented by Beresford, Loucks and Raikes.[15] Although the imprisonment of fathers can have huge detrimental consequences, as Murray and Murray point out:

> The impact of maternal imprisonment (and resulting separation) is likely to be much greater and more likely to result in insecure attachment and psychopathology in children, as mothers are often the sole or main caregiver.[16]

The practical repercussions for the majority of children, who are not then cared for by co-residential fathers after their mother's imprisonment, also means that very few remain in their own home.[17]

As evidenced in the publication by Glove in 2019,[18] strong evidence is also growing of the short and long-term impact of environmental factors and maternal stress on foetal development, birth outcomes and early development. In addition, evidence of how critical the first 1001 days of a child's life, from conception to 2 years of age, are to his or her long term health and wellbeing.

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[9] Recognising that some of these procedures also impact on men, who are carers, and their children.
[10] Ministry of Justice (2018) *Female Offender Strategy*
[11] Ministry of Justice (2018) *Women's Policy Framework.*
[12] Joint Committee on Human Rights (2019) *The right to family life: children whose mothers are in prison.*
[13] World Prison Brief (2020). https://www.prisonstudies.org/highest-to-lowest/prison-population-rate?field_region_taxonomy_tid=14 Accessed June 2020
[14] Barnardo's (2020) https://b.barnardos.org.uk/what_we_do/our_projects/children_of_prisoners.htm
[15] Beresford, S, Loucks, N, and Raikes, B. (2020) *The health impact on children affected by parental imprisonment*. BMJ Paediatrics Open 2020; Volume 4 Issue 1.
[16] Murray, J. and Murray, L. (2010) *Parental incarceration, attachment and child psychopathology*. Attachment and Human Development, 12(4): 289-309.
[17] In the 2008 report *11 Million,* by the Children's Commissioner for England and Wales, this was stated to be as low as 5 per cent.
[18] Glove, V. (April 2019) *The Effect of Prenatal Stress on Child Behavioural and Cognitive Outcomes Start at the Beginning*. Institute of Reproductive and Developmental Biology, Imperial College London. PER CENT

The fact that a disproportionate number of women who have been arrested are from a disadvantaged sector of society, where poverty, insecure accommodation, substance misuse and experience of abuse is more prevalent, means that appropriate support is even more critical in preventing negative outcomes for the next generation. As pointed out by NHS Scotland,[19] the use of drugs, alcohol and tobacco before and during pregnancy are major risk factors for miscarriage, pre-term delivery, and maternal and infant death. NHS Clinical Guidance states that women who misuse substances, and their infants, have better outcomes if they access antenatal care early and if they attend treatment programmes consistently throughout pregnancy.[20] Effective procedures therefore, need to ensure that such women can access effective consistent perinatal care; and specialist support and movement in and out of prison has an inevitable impact on this. This is equally true in relation to mental health issues, accepting that the complex mental health problems presented by many of these women can initially occur or worsen pre and post-birth.

In terms of scale, in June 2020 Ministry of Justice statistics showed that the female prison population for England and Wales stood at 3,255.[21] There is no mandatory national recording of numbers with dependent children and their ages for women entering prison. However, some indication of this is given in terms of data requested from prisoners in the context of inspections; with 61 per cent of all prisoners at Bronzefield,[22] and 53 per cent of convicted prisoners and 58 remand prisoners at Peterborough,[23] stating they had children under the age of 18. The figures are however likely to be higher, bearing in mind the reluctance of some prisoners to disclose this information.

There is a similar dearth in the collection of statistics in relation to numbers of prison receptions per annum of those who are pregnant, at what stage in their pregnancy they were arrested and released, and their pregnancy outcomes. The first audit of numbers pregnant in custody, requested in Parliament in November 2019, following the death of the new born at Bronzefield, gave a figure of 47. This data would have been gathered in the context of a snapshot of known pregnancies in what is a very fluid population. A more realistic picture of the scale of the problem was given by data presented to a Parliamentary Enquiry in 2019, by the Royal College of Midwives, [24] which stated that:

> Around 600 women receive antenatal care in prison and 100 women give birth in custody every year in England.

The following section of this article attempts to identify the key procedures within the criminal justice system that contribute towards this.

Arrest and initial court appearances

Following arrest and before being formally interviewed by the police, the arrestee has the right to legal aid and is given the opportunity to contact her own solicitor or be offered the services of a duty solicitor. This right to free legal advice continues at the first court appearance, after which it is dependent on evidence provided in relation to receipt of state benefits or income status, to ensure that she is within the eligible bracket. This means that for some women who appear at court, whose residential status means that they are not eligible for state benefits and who cannot provide evidence of income, there is

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[19] NHS Scotland (2020) http://www.maternal-and-early-years.org.uk/topic/pregnancy/substance-use-and-misuse-in-pregnancy

[20] NHS (2020) *Clinical Guidance for Management of Substance Misuse in Pregnancy* https://hgs.uhb.nhs.uk/wp-content/uploads/Substance-misuse-in- Accessed August 2020.

[21] Ministry of Justice (2020) *Prison Population Statistics 12th June 2020*. Ministry of Justice (2020) *Prison Population Statistics 12th June 2020*. This compares with 3,774 twelve months previously and the reduction may be resultant on the COVID-19 pandemic.

[22] Ibid.

[23] Ibid.

[24] Royal College of Midwives (2019) (CMP0008) *Evidence given to Parliamentary Enquiry on Rights to Family Life.*

no formal provision of legal aid past this stage.[25] This service is provided by specific legal firms in each location and the majority of women observed in court and interviewed in previous research had been supported by duty solicitors of whom they had no prior knowledge, and who were different at these two stages; the arrestee having no say as to whether this representative was male or female. Input and support is also provided at police stations and magistrates courts by the NHS Liaison and Diversion teams, who have a specific focus on female arrestees where there is evidence of mental health or substance abuse problems. However, as outlined in their Service Specification in 2019,[26] this does not currently include identifying and offering support to women who may be pregnant or caring for a young infant.

After the police interview the woman can be held in police custody or released on police bail, pending her first court appearance at which the charges will be formally placed and, if appropriate, she will be asked to enter a plea. Before this hearing, she will have a meeting with her solicitor, who will have received a briefing at court that morning on the case from the Crown Prosecution Service (CPS). If she has been remanded in custody, this meeting will take place in the cells area. Court observations in 2019, carried out by the author in the context of evaluating support services by a third sector organisation, evidenced duty solicitors working under pressure, representing a number of defendants on different cases in one day and often not able to meet with all their clients before court hearings commenced at 10 or 10.30 a.m. She was advised that this was exacerbated by delays in arrival of prison escort vehicles. Scheduling of some cases was adjourned until the afternoon and observing interviews with support workers it was apparent that some women held in the cells were experiencing high levels of stress, with no update on what was happening, who was going to represent them and when they would be seen.

This critical initial meeting with their solicitor, which is time pressured, needs to focus on the charge and evidence presented by the CPS. The potential for developing trust and sharing of information in relation to personal issues, such as childcare responsibilities or pregnancies, is thus limited. As outlined by Keefe and Dixon,[27] for women who may have been involved with social services in the past, willingness to share such information may also be limited due to an inherent fear that revealing their status as mothers to the authorities might result in their children being removed. Where interpreter support is also needed this may again impede the development of trust.

This initial court hearing may be the first of many, depending on the type of offence and the plea and likely sentencing outcome, as magistrates can only sentence up to six months for a single offence. The CPS will thus identify the case as summary; meaning that it can be heard and sentenced at the magistrates court, either way; where there is a guilty plea that can be tried summarily or by indictment to the Crown Court, or indictable; meaning that it is so serious that it can only be dealt with at the Crown Court.[28]

Bail applications

Of equal importance on the first day of the hearing - assuming the case is not concluded - is the decision whether to grant bail. Despite the fact that, as outlined in the Bail Act1976, there is a *prima facie* right to bail; a bail application has to be made. As outlined by Cape and Smith,[29] in their report on the Practice of Pre-trial detention in England and Wales:

[25] This can be particularly detrimental to members of the Traveller and Roma community.
[26] NHS England (2019*) Liaison and Diversion Service Specification* Nov. 2019
[27] O'Keefe, C. and Dixon, L. (2015) *Enhancing Care for Childbearing Women and their Babies in Prison.* Hallam Centre for Community Justice & Action for Prisoners' and Offenders' Families.
[28] Factors that need to be taken into account in management of either-way offences are outlined in Schedule 3 of the Criminal Justice Act 2003.
[29] Cape, E. and Smith, T. (2016) *The Practice of Pre-trial Detention in England and Wales*, UWE Bristol.

> Courts devote little time to pre-trial detention hearings, caused in part by high case-loads and lack of resources, with bail hearings taking 5 minutes or less in 86 per cent of cases, and bail being granted in less than one in three contested cases.

Where bail is granted, this is normally subject to provision of evidence of place of residence, financial sureties and reporting instructions. This report also points out that, following a refusal to grant bail, subsequent requests can then be made at following court hearings. However the onus is then on the defence to provide additional relevant material to have this changed, and because defendants remanded in custody are not normally produced in person in court for review hearings, there is limited scope for them to impact on this decision.

Following the Schedule 11 amendments to the Bail Act 1976, implemented by the Legal Aid Sentencing and Punishment of Offenders Act 2012,[30] some of the exceptions to the presumption that bail should be granted will not apply where there is no real prospect of the defendant receiving a custodial sentence if convicted. If there is a real prospect of custody, the Court must then consider the risks of granting bail, such as the commission of further offences, failing to surrender to the court and interference with witnesses. Conditions can then be suggested to meet these, such as residence, reporting to the police station and not contacting certain witnesses.

The main arguments observed in court hearings by the author for refusing bail have been statements by the CPS that the offence is so serious that it passes this first threshold and that there is a risk of absconding due to lack of community ties, particularly for those without UK nationality, irrespective of residential status.[31] The author has observed no evidence of these arguments being contested by the defence through provision of information in relation to dependent children registered as local schools or pre-school care, or for those who are pregnant, or registered with local antenatal care services.

Equally worrying is the assumption of *the real prospect* of a custodial sentence, which in many cases is not subsequently validated. Figures for 2016 show that 60 per cent of women remanded in custody by Magistrates' courts, and 41 per cent remanded in custody by the Crown Court, did not receive a custodial sentence.[32] Of equal significance is the fact that Ministry of Justice Data for 2019 shows that 10 per cent of those remanded in custody by the Magistrates, and 13 per cent of those remanded by the Crown Court, were subsequently acquitted. This sudden withdrawal of freedom where bail has been refused has a huge impact on women who are pregnant and on their children. Further, there is no compensation where there is no finding of guilt or a resultant non-custodial sentence.

It is of note that in the latest Thematic Inspection on the work of Probation Services in courts in 2017,[33] that although two of the service requirements outlined were bail services and bail accommodation and support service (BASS), delivery of these were not evaluated as the whole focus was on evaluation of Pre-Sentence Reports and Enforcement Procedures. Indeed court observations would seem to indicate that prioritisation of these two areas of work impacts on attendance in courtrooms where bail decisions were being made, so that any involvement is reactive rather than proactive.

Prison Service statistics for the female estate reported for April to June 2018 thus show a worryingly high number of women denied bail (571), with 41 per cent of all first prison receptions for those on remand, resulting in a population where 14 per cent are not yet convicted.[34] The percentage of those denied bail is even higher for non-UK nationals, of whom 25 per cent are remand prisoners, and the overall percentage of all women on remand has continued to increase between 2018 and 2020. This is

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[30] With the exemption of matters relating to extradition proceedings and convicted adults.
[31] The Policing and Crime Act 2017 requires the defendant to declare their nationality at the start of proceedings.
[32] Hansard (2017) House of Commons question 119151, answered 20th Dec. 2017
[33] HM Inspectorate of Probation (2017) *The Work of Probation Services in Courts.* June 2017
[34] nhttp://www.govuk/government/collectives/offender-management-statistics-quarterly-prison population April-June 2018.

reflected in the population breakdown of prisons and YOIs such as Bronzefield with a catchment area of 95 courts and the largest capacity within the female estate, where 35 per cent of its population are on remand. There is no total annual figure for numbers of first receptions for those on remand, but with a high turnover of 71 per cent within six months, one can conclude numbers are high.

Once in custody, the Bail Information Officer should then seek to identify and advise those who may be bailable and provide them with the facilities to make an applications,[35] but Cape and Smith describe these services as 'patchy'.[36] Where pregnancies are first identified in the context of prison healthcare checks - not an unusual occurrence - one might conclude that this change of personal circumstances would warrant a new bail application or review. However, no evidence has been identified of such applications being made.

As evidenced by Ministry of Justice Criminal Court Statistics (April to June 2019),[37] the period in custody from the date of Listing in a magistrates court to Completion at the Crown Court was on average over five weeks where a guilty plea has been entered, and 24 weeks for a non-guilty plea. The impact of the COVID pandemic on delaying court hearings has resulted in increased completion times over the last 12 months, and the impact of lengthy remands in custody with no social visits from family cannot be overestimated.

From observations of case management in a busy London magistrates' court in 2019 it was apparent that bail decisions for women were routinely made without requests for information in relation to dependent children or pregnancies. Even where evidence could have been or indeed was produced, there were court outcomes that appear not to have been influenced by such evidence. For example in two cases observed, where children of the defendant were in the public court area outside of the courtroom, the duty solicitor did not raise this to contest the decisions to refuse bail. In a third case where the Bench was advised that the mother was eight months pregnant, bail was finally granted with conditions of financial sureties. However, when they could not be met on that day, the traumatised woman was thus remanded in custody.

In previous research carried out by the author,[38] there were a number of cases where children, including babies who were being breastfed, were separated from the mother and taken into care at the point of arrest; bail again was refused. Long delays in accessing places in MBUs then meant that by the point of reunification, breast milk had dried up, and the mother and child were inevitably traumatised by this process. There were similar negative repercussions because of insufficient time given at the point of arrest to try to arrange alternative family carers and, where there were two or more children, the siblings were separated between the appointed carers. Equally unacceptable were delays in advising mothers where the children had been taken and establishing prison visits for their children. All of these affected the mental stability of the mothers and the long-term wellbeing of the children in question, as observed when meeting some member of the research cohort group with their children, post release.

Time in custody

There are currently 12 HMPs and YOIs used for women and female young offenders imprisoned in England and Wales; those with the largest capacity-holding women who are on remand as well as those who are sentenced. All are located in England and despite the fact that a high percentage of women in custody are from the London area, since the closure of Holloway, none are based within the capital; the nearest being HMP and YOI Bronzefield based in Ashford, Middlesex. None is easily accessed by direct public transport, impeding visits from family and friends who would offer key support in the

[35] In compliance with Prison Service Order 6101.
[36] Ibid.
[37] Ministry of Justice (2019) *Criminal Court Statistics quarterly report April-June 2019.*
[38] Hales, L. and Gelsthorpe, L. (2012) *The Criminalisation of Migrant Women*

community for a woman who was pregnant or caring for a young child.[39] Once sentenced, the woman might well be moved to another prison within the female estate.[40]

On entering prison, in addition to the uncertainties of their ongoing case, and for those not yet sentenced, pregnant women face many additional challenges, as outlined by Abbott's detailed ethnographic study of perinatal women in custody.[41] These include managing the risks of living in unspecialised prison wings whilst pregnant, management of their births, hospital appointments and access to appropriate medical support, uncertainties about whether they should or will be able to keep their babies and access places on MBUs (as discussed below), and resultant fears of disclosing mental health issues.

Access to mother and baby units

Within the female estate, there are currently five MBUs, with capacity for 64 mothers and 70 babies. As pointed out in the study by O'Keefe and Dixon,[42] these places were underutilised in 2015 and there is no evidence that this has changed. Some of the factors behind this are identified in research carried out by Gregoire et al.[43] This includes reluctance to apply (due to factors such as length of sentence and inevitable separation), the view that prison was not the right environment for their child, and the fact that their child was already in the care of social services.

Evidence of the potential impact of imprisonment on pregnant women and their children supports the view that whenever possible this should not happen to a woman who is pregnant or has a baby under the age of two years. However of equal concern is the manner in which some decisions are made by the court on the day, with no adjournment in relation to remands in custody, and imposition of an immediate and unexpected custodial sentence or recall on licence. This gives the mother no time to decide on what is then in the best interests of her children, leaves no potential for contact or negotiation with potential carers, or for explanations by the mother to her children as to what is happening.

In addition, if the intention is to try to keep a young child with their mother, there is the false assumption that a place on an MBU will be immediately accessible. This is not the case as there is a formal procedure for applying and being considered for places on MBUs that can only start once the woman is in custody. This includes satisfying the MBU Admissions Board that this mother would not present a risk to her own or other babies on the unit and consideration of factors such as mental health and misuse of drugs. The timings of these boards, before which necessary medical and psychiatric reports, drug tests etc. need to be accessed, cause inevitable delays. It is therefore critical that, as recommended by the Joint Committee on Human Rights in 2019,[44] decisions regarding custody are adjourned to prevent the traumatic separation of mothers and their babies.

Over one third of applications for MBU places are finally refused and this may well increase the number of children removed post birth from women who have issues of substance misuse or mental health. This is where the decision in the community might have been that it was in the interests of the child to remain with the mother, provisional on engagement with appropriate support.

The punishing impact of remands in custody

As mentioned above, from the initial remand in custody to trial and/or sentencing the woman may spend many months in custody. During this time, the stigma of being a prisoner applies equally to those who have been charged with an offence and those who have been found guilty and sentenced to

[39] During the preparation of this report all visits were suspended due to the COVID-19 pandemic.
[40] Unless allocated a place to a specific MBU.
[41] Ibid.
[42] O'Keefe, C and Dixon, L (2015) *Enhanced Care for Childbearing Women and their Babies in Prison.* Hallam Centre for Community Justice.
[43] Gregoire, A., Dolan, R., Birmingham, L., Mullee, M. and Coulson, D. 'The mental health and treatment needs of imprisoned mothers of young children' (2010) 21(3) The Journal of Forensic Psychiatry & Psychology, 378.
[44] Ibid.

imprisonment. One area where this is evident is in relation to hospital visits for antenatal care where, as noted by Abbott, the use of handcuffs and restraints identifies any women with prison escort staff as a *criminal* to other hospital visitors and medical staff.[45]

A number of cases have been recorded where this period of waiting has meant that those who were in the first or second trimester of their pregnancies at point of arrest gave birth before their trial or sentencing. [46] In one such case, by the time the court found there was no case to answer and the defendant was to be released, she had spent 13 months in custody and her baby was five months old. In a second case, the mother, suffering depression and stress in relation to her imprisonment, developed the dangerous condition of pre-eclampsia. The resultant hospitalisation, prior to birth, delayed the trial date to the point that, with a finding of guilt, the court concluded that she had already served the likely maximum sentence and she was again released from court. In a third case, the defendant suffered a miscarriage in the second trimester, resulting in severe depression and her inability to emotionally manage visits from her child in care.

For all these women this remand period was one of extreme anxiety and, for those with children in the community, what they expressed as guilt in relation to their perception of *failing* as mothers. The unpredictability in relation to progress of the court case was talked about as more punishing than a fixed prison sentence, with inevitable impacts on their mental state and potential damage to the wellbeing of the foetus. This anxiety was often exacerbated by inconsistency in legal representation, limited face-to-face contact to try to understand what was happening with their cases, and for those who went to trial at the Crown Court - being represented by barristers with whom the first contact was sometimes in the court cells area prior to their appearance.

For those who had been resident on MBUs before trial or sentencing, attending court also meant taking their baby with them and waiting with that child in an unlocked room in the cells area, with no specialist facilities. In these cases, a social worker was accessed to care for the child whilst the mother was in the courtroom, but the timing of these hearings did not take account of the stress for both mother and child of a long day at court and the time taken travelling between prison and the court.

Sentencing decisions

As set out in the Criminal Justice Act 2003, the five key goals of sentencing are punishment of the offender, reduction of crime, reform and rehabilitation of the offender (for example drug or alcohol rehabilitation), protection of the public and to make the offender give something back (such as compensation payments).

This Act also states that custodial sentences should be imposed for the most serious offences where neither a fine alone nor a community sentence can be justified for the offence. They can also be imposed where the offender is considered to present a risk to the public. However, statistics produced by the Ministry of Justice on women in the criminal justice system in 2018,[47] show that the majority of those in custody are not high risk in terms of the seriousness of offence or risk they present to others. They included 36 per cent sentenced for theft, 19 per cent for summary (non-motoring offences) and 13 per cent for breach of a court order. Lengths of sentences within this database reinforce the conclusion that those sentences do not meet the above criteria in terms of seriousness of offence or risk to the public, with 55 per cent of the prison sentences shorter than three months and 68 per cent less than six months.

In terms of reform and rehabilitation, re-offending statistics evidence how ineffective short sentences are. The limited impact of rehabilitation work over a short time in custody can be further hindered when

[45] Ibid.
[46] A typical pregnancy lasts for 40 weeks. The three stages, each of approximately 3 months are referred to as the *first, second* and *third trimesters*.
[47] Ministry of Justice (2018) *Statistics on women in the Criminal Justice System 2017.*

allocation to specific programmes only start once sentenced, for those who have spent considerable time on remand. As pointed out in Minson's 2020 briefing paper on Women in Prison:[48]

> Despite the Government's own Female Offender Strategy 2018, which made clear the need for women to be diverted from custody, women continue to be sentenced to very short periods of custody.

Pre-Sentence Reports can be requested by the Bench prior to making a final sentencing decision and it is apparent that information on the defendant's circumstances and identification of appropriate support provision within the community has the potential to increase the likelihood of a community-based option. However, the author has observed a number of cases where the Bench has stated that a custodial sentence was inevitable and they could see no purpose in adjourning the sentence to gather additional information. Hopefully the new sentencing guidelines and implementation of the amendments to the Police, Crime, Sentencing and Courts Bill, as outlined in the final section of this report, will ensure that for those who are pregnant or with dependent children this will no longer be the case.

Post-release supervision and licence recalls

When a person is sentenced to a fixed prison sentence of 12 months and over they will be released from prison at the halfway stage and subject to licence conditions until the end of their sentence; with low to medium risk offenders supervised by Community Rehabilitation Companies (CRC) and high risk supervised by the National Probation Service (NPS).[49]

Following implementation of the Offender Rehabilitation Act 2014 (ORA), licence requirements were extended to all prisoners on release from custody, ensuring all those sentenced to periods of imprisonment from one day, to less than 2 years, were under supervision for 12 months. This therefore topped up the licence period for those serving shorter sentences and resulted in a dramatic increase in the numbers of short-term prisoners being released under inflexible supervision requirements. Many of these women had complex and multiple needs and chaotic lifestyles in relation to issues such as mental health, substance abuse, debt, and unstable housing, all exacerbated by their time in prison, without the resources to help with these issues.

Since the implementation of the ORA, the numbers of women being recalled has tripled, with the latest published Ministry figures indicating a 29 per cent licence recall rate, with 1,846 recalls of women to custody whilst on licence in the year ending September 2018.[50] This has meant that at prisons such as Bronzefield, 555 receptions in 2018-19 were resultant on licence recall.[51] It also accounts for the fact that at any one time 8 per cent of women in the female estate are there due to licence recall.

A study on licence recall made by the Prison Reform Trust demonstrates that the initial goal of supervision for all, which was provision of more support, has failed. [52] CRCs and the NPS have been powerless to help with the key issues, particularly housing, debt, abusive relationships and mental health needs. Instead of being in a position of trust with a supervising officer, the relationship was seen as one of coercion - with failed appointments - rather than of re-offending or the risk of this, resulting in these recalls.

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[48] Minson, S. (2020) Centre for Criminology, University of Oxford *Women in Prison and release Measures during the COVID-19 Pandemic.*

[49] Contracts with CRCs terminate in June 2021 when the new operating model for the National Probation Service in England and Wales comes into effect.

[50] Various editions of the Ministry of Justice Offender Management Quarterly Statistics were reported in the House of Commons debate Report (Feb 2019) on the *Recall to Women to Prisons.*

[51] IMB (2019) *Annual Report of the Independent Monitoring Board at HMP and YOI Bronzefield*. For the reporting year 01 August 2018 – 31 July 2019.

[52] Prison Reform Trust (2018) *Broken Trust. The rising number of women recalled to prison*

Of the 24 women who had been recalled and were interviewed by the PRT, three were pregnant at time of recall and one stated that failure to attend one appointment had been due to a hospital visit for a pregnancy scan. This woman stated she was recalled and separated from her daughter shortly after giving birth. There is no evidence in any of these recall decisions of the potential impact on dependent children or risks presented to a pregnancy or birth being taken into account.

Post-release challenges

Release from prison, particularly during the perinatal period and/or whilst caring for young children or seeking reunification with children in the community, is a time of great vulnerability for women. For those whose children are in temporary care, reunification will be dependent on appropriate housing, but accessing this housing will be dependent on current child-care responsibilities, so that many women find themselves in an impossible situation. Those whose imprisonment separated them from their children will also be facing the emotional challenges of re-establishing this link, where the trauma of past separation can hinder new trust with the mother. For those who have given birth in custody and have older children in the community, there is the additional challenge of engaging these children with their new sibling, at a time when many women have a very low feeling of self-worth. Loss of accommodation whilst in custody also inevitably necessitates re-location without support networks and, for older children, changes in schooling. Compliance with supervision requirements, whilst moving between a number of temporary locations and caring for children, is thus very challenging

The way forward and conclusions

As outlined above, the high number of pregnant women and those with young children who enter the prison estate each year is the result of a number of different elements of the criminal justice system from the point of arrest. It is then exacerbated by the revolving door of recall and failure to access long-term community support in relation to key issues such as housing, poverty, abusive relationships, mental health problems and substance misuse.

In the overall management of these women, there is the potential for better-informed decisions, if effective resources were allocated to facilitate completion of *Personal Circumstances Files* from the first contact with the criminal justice system, as recommended by Lord Farmer in his Review for Women in 2019.[53] However, if implemented, it is critical that these women would not be penalised for failure to disclose personal information at the initial stage.

In relation to court proceedings, there is also the potential for change following the New Sentencing Guidelines that came into force from 1 October 2019, which include an expanded explanation for the mitigating factor *'sole or primary carer for dependent relatives'*. As outlined by Minson,[54] the key elements of these are that:

- the court should not impose a sentence of imprisonment where the impact on dependants would make a custodial sentence disproportionate to achieving the aims of sentencing;
- the court should consider the impact of the sentence length on dependants and whether the sentence can be suspended;
- the court should consider the effects on dependants when deciding on the requirements of community sentences;

[53] Lord Farmer (2019) *The Importance of Strengthening Female Offender Family and other Relationships to Prevent Reoffending and Reduce Intergenerational Crime*. Ministry of Justice.
[54] Minson, S. (2019) https://shonaminson.com/2019/10/01/new-sentencing-guideline-in-force-from-1st-October-2019/

- when the defendant is a pregnant woman: the relevant considerations should include the effect of a sentence of imprisonment on the woman's health and any effect of the sentence on the unborn child;
- the court must ensure that it has all relevant information about dependent children before deciding on sentence (in accordance with the case of *R v Bishop* [2011];
- the court should consider whether proper arrangements have been made for dependent children when imposing a custodial sentence, and consider adjourning sentence in such cases in order for proper plans to be in place for children;
- the court should ask the National Probation Sentence to address the defendant's caring responsibilities and the impact of any sentence on the care of their dependants in a Pre-Sentence Report.

This is taken further by the report published on 14[t] May 2021 by the Joint Committee on Human Rights on Children of mothers in prison and the right to family life report: The Police, Crime, Sentencing and Courts Bill [55] which tables 4 key amendments requiring;

1. a sentencing judge to have a copy of a pre-sentence report considering the impact of a custodial sentence on the dependent child, when sentencing a primary carer of a child;
2. a sentencing judge to state how the best interests of a child were considered when sentencing a primary carer of a dependent child;
3. a sentencing judge to consider the impact of a custodial sentence on a child when sentencing a primary carer of a dependent child;
4. a judge to consider the impact of not granting bail on a child, when determining, in criminal proceedings, whether to grant bail to a primary carer of a dependent child.

Additional clauses also include reference to the best interests of the baby where the women is pregnant (in amendment 2), and the inclusion of the unborn child in amendments 3 and 4. Further, there was a request for the Secretary of State to collect and publish data on the number of prisoners who are the primary carers of a child and the number of children who have a primary carer in custody.

These proposed changes in the law have the potential to finally ensure an appropriate focus on the impact of sentencing and bail decisions on dependent children, including those not yet born. However, evidence gathered suggests there is still a need to focus on the impact of current service provision and decision making at all stages of the criminal justice system. This should include Liaison and Diversion provision, legal support, management of those whose pregnancy is first identified whilst in prison, assessment procedures for Mother and Baby units, and licence supervision with service provision to meet the complex needs of these women, thus reducing the risk of recall. Finally, where there is evidence of non-compliance with licence conditions, appropriate consideration of alternatives to recall for those who are pregnant or have dependants. Until this happens there will continue to be unjustifiable risks to foetal and maternal health during pregnancies, birth outcomes and to the short and potentially long-term health and wellbeing of new born babies and children of women who continue to end up in the custodial estate.

Postscript

At the time of going to print, on 22 July 2021 the Government published its response to the Joint Committee on Human Rights First Report on *Children of mothers in prison and the rights to family life: the Police, Crime, Sentencing and Courts Bill.* Unfortunately, none of the four key proposed amendments to the PCSC Bill was accepted as necessary. In brief, there was no move in relation to the requirement for a pre-sentence report when sentencing a primary carer, arguing that there is already sufficient guidance in relation to this and to improvements in delivery. Nor was there acceptance of the obligation on the sentencing judge to state how he/she considered the consequences for the child in the

[55] https://committees.parliament.uk/publications/5846/documents/66463/default/

sentencing remarks, on the basis that the statutory duty by virtue of s.52 of the Sentencing Code is sufficient. Equally worryingly was the response that it was considered as 'not necessary' for courts to be under a further explicit statutory obligation to consider the welfare of offenders' children when sentencing, in view of existing case law and sentencing guidelines. Finally, the amendment in terms of making the welfare of a child a distinct consideration in determining bail for a primary carer was again considered not necessary, arguing that the court already has to balance the aims of custody against the impact this can have on family life and any dependants. However, the Government response did point out that work is being carried out on the Basic Custody Screening Tool to facilitate collection of more robust data on a national level of parental responsibilities for those in custody.

HUMAN RIGHTS

Long in the making: the 'Gross Review' and Conservative Party Policy on the reform of human rights law

Steve Foster*

Introduction

On 7 December 2020, the Justice Secretary, Mr Robert Buckland, announced that Sir Peter Gross, a former Lord Justice of Appeal, would chair a panel tasked with reviewing the operation of the Human Rights Act 1998.[1] The announcement was not unexpected: reform of human rights law having been included in the Conservatives' 2019 general election manifesto. The Ministry of Justice argued that given the body of case law now in existence, the review was needed to enable ministers to satisfy themselves that the UK's '…human rights framework…continues to meet the needs of the society it serves'. [2] Mr. Buckland subsequently raised eyebrows as he sought to reassure critics, by claiming that he was keeping an open mind on the review and any reforms it might recommend.

The critics themselves, however, were unconvinced, largely because of doubts over the Government's real intentions.[3] The review was perceived as 'pay back' for high profile Conservative defeats on the exercise of prerogative powers during the Brexit process.[4] It was also seen as part of the ongoing 'culture war' waged against progressive elements in British society. More worryingly, undermining the Human Rights Act is an obvious accompaniment to the smorgasbord of legislative provisions that currently threatens to reshape the constitution in a decidedly authoritarian direction.[5]

Yet, whatever the merits of such criticisms, it is undeniable that human rights law remains a highly contested subject. Further, the Conservatives have been consistent in their opposition to the Human Rights Act for some time; only the realities of coalition government and the 'fall out' over Brexit prevented them from introducing reforms at a much earlier point. Consequently, whilst the decision to review human rights law might be very well an exercise in political opportunism, it might be injudicious to conclude that it is no more than that.

Conservative thinking on human rights: an overview

To reiterate, the Conservatives do indeed have sound *political* reasons for establishing the Gross Review. Under Boris Johnson, they have politicised popular resentment that Britain's national interest has been undermined by unrepresentative elites who have prioritised (undeserving) minorities, at the expense of 'everyday folk'. The Human Rights Act is vulnerable in this context, especially given the toxic nature of the media criticism to which it is routinely subjected. In addition, the very visible European connection, embedded in the language of the Convention and the Court it supports, offers the

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[1] The other members being: Simon Davis, Baroness O'Loan, Sir Stephen Laws QC, Lisa Giovannetti QC, Professor Maria Cahill, Professor Tom Mullen and Alan Bates

[2] *Guidance - Independent Human Rights Act Review*, 7 December 2020: https://www.gov.uk/guidance/human-rights-act-review

[3] See for example Nicholas Reed Langen, 'What's really behind Boris Johnson's review of the Human Rights Act?', *The Justice Gap*, 11 December 2020

[4] Most obviously, *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5, and *R (Miller) v The Prime Minister* [2019] UKSC 41.

[5] The following are obvious candidates for inclusion the Elections Bill, Part 1; the Higher Education (Freedom of Speech) Bill; the Nationality and Borders Bill, Parts 2-3; the Police, Crime and Sentences Bill, Parts 3-4; the Covert Human Intelligence Sources Act 2021; and the Overseas Operations (Service Personnel and Veterans) Act 2021

collateral benefit of enabling the party to continue the politics of Brexit long after the UK has left the European Union.

Secondly, many of the Government's legislative proposals have profound implications for civil liberties.[6] On this point, critics will have taken note of the recent criticisms articulated by David Boyd, the UN special rapporteur for human rights and the environment.[7] The nature and content of these provisions suggests that human rights challenges are virtually inevitable. Anticipating these, ministers will no doubt wish to 'future proof' their legal position by fixing the rules governing the operation of the Human Rights Act in their favour.

However, one should not overlook that Conservatives have other, possibly more principled reasons for questioning human rights law. There exists a distinctive Conservative mind-set on constitutional matters, one that the Human Rights Act 1998 was always likely to challenge. Some Conservatives exhibit considerable scepticism over the very *concept* of human rights. On the one hand, it is so contested that a consensus depends on defining rights so broadly as to undermine their practical value. On the other, defining rights too specifically creates different problems: endless controversy and conflict. The inevitable conclusion they draw is that in a democracy, questions of human rights should be resolved politically by the current cohort of the people's elected representatives. They can be trusted to give appropriate protection to those *basic* freedoms – expression, equality before the law, the right to participate in elections, etc. – that reflect British traditions and hence retain mainstream support.

In addition, the Conservatives place great emphasis on 'strong government', whereby policy-making is dominated by the executive, subject to parliamentary debate and approval. The supremacy of statute law is central to this, as is the acceptance by governing party MPs on their very limited *de facto* freedom to vote against their own government. Democracy is preserved by two things: competitive elections using a system which gives voters the power to replace at a single stroke one party of government with another; and the willingness of governing parties to adhere to 'the rules of the game' and resist the temptation to legislate solely to perpetuate their rule. It follows that there is little if any room for extensive formal checks and balances, especially an entrenched written constitution supported by a constitutional court.

The Human Rights Act does not fatally wound this model; it does, however, subject it to a not inconsiderable 'stress test'. The Act was, of course, designed to reconcile the idea of constitutionally protected rights with the ruling principle of parliamentary sovereignty, thereby placing clear limits on the judicial role. Most obviously, Parliament is freed from the duty not to act in ways that are incompatible with Convention rights, whilst the courts cannot 'strike down' primary laws. More generally, it remains open to Parliament to legislate in order to counteract the effects of any court ruling of which it disapproves.[8] These are, by no means, inconsiderable concessions to constitutional tradition. However, over time they have not proved sufficient to retain Conservative support.

The legal context

Concerns over developments in case law offer some help in explaining this. (Given the wealth of cases, selected examples will have to illustrate a more general point.) A starting point is the domestic courts' interpretation of their duties under s.2(1) to 'take into account' the jurisprudence of the European Court of Human Rights (ECtHR). This centres on Lord Bingham's judgment in *R (Ullah) v Secretary of State for the Home Department*,[9] though Lord Hoffmann's judgment in *AF v Secretary of State for the Home*

[6] See, for example, Steve Foster 'Travelers' rights, local authority duties and human rights' (2020) 25(2) *Coventry Law Journal* 114.
[7] Jo Griffin, 'UK introducing three laws that threaten human rights, says UN expert', *The Guardian*, 24 June 2021.
[8] Note that the effects of the Supreme Court's judgments in the Miller litigation (see footnote 4 above) were overcome by the enactment of the European Union (Notification of Withdrawal) Act 2017 and the Early Parliamentary General Election Act 2019 respectively
[9] [2004] UKHL 26

Department and another[10] also attracted comment (see below). According to Lord Bingham, domestic courts have a duty to 'keep pace with the Strasbourg jurisprudence' and should not therefore seek to dilute or weaken it without having a strong reason to do so'. This judgment, which has been interpreted to mean that domestic courts are obliged to follow Strasbourg, has been subject to much judicial as well as political criticism.[11]

Secondly, there is the toxic legacy of *Hirst v United Kingdom (No. 2)*,[12] where the ECtHR ruled that the blanket ban on the right of convicted prisoners to vote breached Article 3 of the First Protocol and fell outside any acceptable margin of appreciation.[13] Such was the level of ministerial disregard for the ruling that twelve years were to pass before ministers finally proposed a solution that met with the Committee of Minister's approval.[14] As the Commons debate in February 2011 indicates, *Hirst* graphically exposed the extent of cross-party opposition to how the human rights framework enables judges, including those sitting in a respected international court, to act contrary to the principle of parliamentary sovereignty on such an important domestic issue.

However, the one area of human rights law that has drawn more Conservative ire than any other is judicial restrictions on the government's power to detain and deport foreign nationals suspected of terrorism. This was specifically mentioned in their manifestoes of 2015 and 2019. Any number of important themes are covered by it: judicial overreach, the unacceptable narrowing of the margin of appreciation and judicial deference, conflict of rights, undermining Parliament and so on and so forth.

Three specific issues might be noted. The first of these concerned the right of ministers to detain foreign nationals without trial in lieu of deportation. In *A v Secretary of State for the Home Department,*[15] the House of Lords famously ruled that the detention regime authorised by Parliament in s.23 of the Anti-Terrorism, Crime and Security Act 2001 was both disproportionate and discriminatory. As a result, it was incompatible with both Articles 5 (liberty of the person) and 14 (right to enjoy Convention rights free from discrimination) of the Convention. That a domestic court was prepared to challenge the government (and Parliament) over an issue which involved 'core' executive functions attracted much adverse comment both then and since. The courts, however, were undeterred. Following the ECtHR's ruling in *A and others v United Kingdom*,[16] the House of Lords subsequently ruled that the closed material procedure adopted by the Special Immigration Appeals Commission (SIAC), which meant that the decision to impose control orders was taken using evidence that neither the suspects nor their lawyers were able to see, was a clear breach of Articles 5 and 6.[17] As mentioned above, this ruling is particularly important. Lord Hoffmann, whilst finding for the detainees, recorded his '… very considerable regret, because I think that the decision of the ECtHR was wrong and it may well destroy the system of control orders which is a significant part of this country's defences against terrorism'. He took this position because the House of Lords had no alternative than to accept the decisions of the ECtHR where they concerned the interpretation of the European Convention.

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[10] [2009] UKHL 28.
[11] Hilaire Barnett, *Constitutional and Administrative Law*, 14th edition, Oxford? Routledge (2021), 476-78.
[12] (2006) 42 EHRR 41.
[13] This provision is made at s.3 of the Representation of the People Act 1983. The law, which is consistent with statute dating from the Forfeiture Act 1870, was amended by the Representation of the People Act 2000, which granted the franchise to remand prisoners and those detained under mental health law. However, this reform proved insufficient to convince ECtHR justices in *Hirst*
[14] Ironically, in light of public criticism of the judiciary, this was an issue on which ministers enjoyed considerable judicial support. A key ruling was made by the Court of Appeal in *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, which held that any amendment to domestic law was a matter for Parliament not the courts.
[15] [2004] UKHL 56 (the 'Belmarsh case'). The government responded by arranging for the repeal of Part IV of the Act and its replacement with a new statutory regime under the Prevention of Terrorism Act 2005
[16] (2009) 49 EHRR 29.
[17] In *AF v Secretary of State for the Home Department* [2009] UKHL 28.

However, perhaps the most notorious case – legally and politically – concerns the third issue: the lawfulness of deportation orders carrying a real risk of torture in the receiving country. This formed the heart of the Abu Qatada saga, which began in February 2001 and did not conclude until July 2013 when twelve years after his first arrest, Abu Qatada finally left the UK. Several questions are wrapped up in this case, the first being the authority of the House of Lords' ruling that Abu Qatada could be lawfully deported.[18] He subsequently, appealed his case to the ECtHR. On 17 January 2012, in *Othman (Abu Qatada) v United Kingdom*,[19] the ECtHR contradicted the Lords' position and ruled that Abu Qatada's deportation to Jordan would be a violation of his right to a fair trial protected under Article 6. In an attempt to circumvent the ECtHR's judgment, the Home Secretary, Theresa May, obtained reassurances from the Jordanian government regarding his treatment and the nature of any criminal proceedings. However, on 12 November 2012 SIAC, to whom the case had been remitted, ruled that these reassurances were inadequate and that the deportation order against him should have been revoked, a ruling subsequently upheld by the Court of Appeal.[20]

In Conservative eyes, the effect of this line of cases was two-fold. First, in January 2012 an international court – the ECtHR - had overturned the ruling of the senior domestic court, even when it could be argued that the latter was far better placed to rule on the issues involved and the circumstances that applied in Britain at the time. Later, with the support of the Court of Appeal, a lesser *domestic* court – SIAC – had also effectively overturned the same ruling, with all that this implied for the doctrine of stare decisis. The second issue is one of wider application. This concerns the question of authority and the proper discretion the executive must be allowed to discharge its fundamental functions. Quite simply, are the courts properly equipped to rule on the nature of international agreements of the type negotiated by the British and Jordanian governments and whether these adequately balance competing needs of collective security and individual rights?

Conservative Policy on human rights, 2005-12

It is not the purpose of this article to comment on the justice (or otherwise) of these and other criticisms of the case law. Instead, the key issue is the extent to which they aid our understanding of Conservative policy. In recent times, Conservative concerns over human rights law can be traced to a speech by David Cameron to the Centre for Policy Studies on 26 June 2006.[21] With hindsight, this speech seems remarkably nuanced. In particular, Mr. Cameron sought to claim rights-protection as a distinctively *Conservative* issue, emphasising that freedom '…is central to the British way of life' and '…a vital part of our history and our heritage'. In addition, he attacked the record of the Blair government, which he accused of being 'hyperactive' yet ineffective on the issue of security whilst increasingly authoritarian in its attitude towards liberty.[22]

However, the main point of his address was to advertise his key reform proposal – the replacement of the Human Rights Act with the now famed (and fabled) 'British Bill of Rights'. This was included both in the 2010 general election manifesto and the Coalition Agreement, which committed the government to establish '…a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights'. The Commission commenced work on 18 March 2011 under the chairmanship of Sir Leigh Lewis. Its final report entitled *A UK Bill of Rights? - the Choice Before Us* was published on 18 December 2012 and since no

[18] [2010] 2 AC 110.
[19] (2012) 55 EHRR 1.
[20] [2012] 11 WLUK 301 (SIAC); [2013] EWCA Civ 277.
[21] David Cameron had replaced Michael Howard as Leader on 6 December 2005.
[22] The attack on New Labour's proved politically useful during the coalition negotiations with the Liberal Democrats. The issue of 'Civil Liberties' was covered in Section 3 of the Coalition Agreement, where the two parties committed themselves to reversing the erosion of the 'fundamental human freedoms and historic civil liberties', which they alleged had occurred since 1997. Privacy rights figured prominently. A 'Freedom Bill' was promised[22], along with specific pledges to scrap the planned arrangements for a national ID card, the National Identity register and the controversial ContactPoint database. In addition, and ironically in light of the current 'Kill the Bill' protests, the Agreement also promised to restore lost rights to non-violent protest.

unanimous recommendations were made, was aptly titled. On the central issue of whether a Bill was needed, the Commission divided 7-2 in favour of a new document. However, as one of the dissenters, Professor Philippe Sands, pointed out, the majority was also divided on the pivotal issues of the content of the Bill and whether or not it should be based on the European Convention. In light of this, Sadiq Khan's observation that the Commission had simply wasted £700,000 of taxpayers' money seems hard to dispute.[23] However, one should avoid being too hard on the Commission. Other than the chair, its membership was equally divided between Cameron and Clegg nominees. More importantly, as it carried out its work, opinion within the Coalition over rights-protection was both dividing and hardening.

A hardening of attitudes…and a failure to reform

An indication of this can be seen in another Cameron speech, dated 25 January 2012, to mark the UK's chairmanship of the Council of Europe. This focused on failings of the European Court of Human Rights (ECtHR) rather than the Human Rights Act.[24] Equally, it was a clear indication that the Conservatives saw human rights law *per se* as a target that should and could be attacked more aggressively.

Where the Prime Minister led, his backbenchers followed. An entertaining example of this is Richard Bacon MP's speech on 4 December 2012, on a backbench motion seeking leave to introduce a Bill to repeal the Human Rights Act and resile from the Convention.[25] Whilst the motion failed to pass, the influence of Mr. Bacon and his fellow Conservative backbenchers was growing. This became apparent at the 2013 annual Conservative conference when Chris Grayling (Lord Chancellor and Justice Secretary) and Theresa May (Home Secretary) both made speeches condemning Britain's 'broken human rights system'. Mrs. May also took the opportunity to clarify her view that this fixing could involve the UK leaving the European Convention.

However, the key moment in the development of Conservative policy came on 3 October 2014, when Mr Grayling revealed *Protecting Rights in the UK.* Despite the passing of the years, this remains a significant document. The first section, 'The Case for Change', picked up and amplified many of the points made in Mr. Cameron's 2012 speech to the Council of Europe. The first major criticism focused on the jurisprudence of the ECtHR, which thanks to the 'living instrument' doctrine had extended the application of the Convention '…into new areas, and certainly beyond what (its) framers…had in mind when they signed up to it'[26] A second problem was self-inflicted. As interpreted by the courts, s.2 of the Human Rights Act had uncritically incorporated into domestic jurisprudence the alien doctrine of 'proportionality'.[27] This then led to two additional problems. One, domestic courts were dragged into essentially political issues, i.e. whether decisions of UK public authorities were proportionate to their objectives. Two, the inappropriate balance in ECtHR jurisprudence, which overplayed rights at the expense of responsibilities, had been replicated in domestic law.

The defects in s.3, by contrast, had undermined two vital principles of the UK constitution: parliamentary sovereignty and democratic accountability. This stemmed from the 'artificial lengths' to which domestic judges went to ensure the meaning of legislation complied with what the document

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[23] British Bill of Rights commission fails to reach agreement - BBC News: https://www.bbc.co.uk/news/uk-politics-20757384

[24] Respectively, these were: a failure to prioritise, the recreation of the Court as a 'court of last instance' and the narrowing of the margin of appreciation accorded members states like the UK with otherwise strong records on human rights, something which the Prime Minister blamed for growing public disaffection with the Convention and a resulting loss of legitimacy.

[25] Richard Bacon has been the Conservative MP for South Suffolk since 2001.

[26] The parallels with the debate between US strict and loose constructionists, shortly to reignite following the US Supreme Court's ruling in *Obergefell v Hodges* (526 U.S. 644 (2015)) , are all too apparent.

[27] Though it might be added that domestic courts were already reappraising the value of the '*Wednesbury'* unreasonableness test long before the Human Rights Act became operational; *R v Ministry of Defence ex parte Smith* [1996] Q.B. 517 being a useful example

tellingly referred to as *their own* interpretation of the Convention. Further, that consistency with the Convention had been achieved at the expense of inconsistency with Parliament's intentions, with all that implied for the latter's sovereignty, and was something that appeared to have passed judges by. Finally, in giving statutory protection to certain Convention rights (but without also creating a constitutional safeguard akin to Germany's 'Basic Law'), the Human Rights Act had exposed all domestic laws - including those passed by clear parliamentary majorities on the initiative of governments with equally clear electoral mandates - to the risk of being overridden by or at the behest of the ECtHR.

The proposed British Bill of Rights, which continued to form the centrepiece of Conservative reforms, would nullify these and other defects. Firstly, by '…remain(ing) faithful to the basic principles of human rights set out in the 1950 Rome Convention', it would continue to protect '…'basic rights', like the right to a fair trial…which are an essential part of a modern democratic society'. At the same time, it would reverse the 'mission creep' that has seen the Act used for a range of purposes for which the 1950 Convention had not been intended. Instead, the promised Bill would adopt a 'common sense' approach, one that would also give proper regard to 'the rights of wider society'. In the process, it would ensure that the UK Supreme Court would be the court of last instance in interpreting and applying human rights law and, further, that a legal arrangement would be put in place which would make it easy for Parliament '…to introduce additional limitations on where and how human rights can be applied' as it saw fit.

This critique was reflected in the party's 2015 manifesto. However, there was one important point of difference. *Protecting Rights* had recognised what it called 'The International implications' and accepted that unless the agreement of the Council of Europe to the Conservatives' proposals could be secured, the UK would be forced to withdraw from the European Convention. The manifesto, by contrast, was silent on this point.

As events transpired, however, it was another constitutional issue – Brexit - that put paid to any immediate prospect of change. This was acknowledged by the Conservatives in their 2017 manifesto. Although they remained committed to reform, this would have to await the conclusion of the Brexit process. The specific pledge to repeal the Human Rights Act was also omitted. There was, however, one point of interest; namely, an implied threat to withdraw the United Kingdom's signature from the Convention was included. This was hidden, none too subtly, in the statement that the UK will remain a signatory 'for the duration of the next Parliament', which at the time meant June 2022.

The Conservatives' 2019 General Election Manifesto and the Independent Human Rights Act Review (the 'Gross review')

Compared to their 2015 equivalent, the proposals in the Conservatives' 2019 manifesto might appear as rather modest. In particular, the pledge to repeal the Human Rights Act was replaced by a commitment merely to 'update' it. In addition, and unlike the situation in 2017, the implied threat to remove the UK's signature to the European Convention was also missing. More generally, the manifesto pledged to draw on independent advice before proceeding with any reforms.[28] The source of this is, of course, the Gross Review, whose official launch (as one might expect) was accompanied by 'flag-flying' and not a little triumphalism:

> 'Her Majesty's Government is committed to upholding the UK's stature on human rights; the UK's contribution to human rights law is immense and founded in the common law tradition. We shall continue to champion human rights both at home and abroad.'

[28] The actual commitment was to create a 'Constitution, Democracy and Rights Commission'. However, it is clear that this is no longer the Government's approach, which now favours allocating this work to smaller, more bespoke bodies

The review's terms of reference focus on 'the framework of the Human Rights Act, how it is operating in practice and whether any change is required'. The first 'framework issue', as it might be called, concerns the domestic courts' interpretation of s.2 and the implications this has for their wider relationship with the ECtHR. In particular, Sir Peter is asked to consider:

- The manner in which domestic courts have applied their duty to 'take into account' relevant ECtHR jurisprudence;
- When discharging this duty, how domestic courts have approached issues falling within the 'margin of appreciation' allowed under the Convention;
- The current arrangements whereby domestic courts raise with the ECtHR their concerns over the regard the latter's jurisprudence has for the UK's particular circumstances.

The second issue focuses on a possible constitutional imbalance resulting from the Act; most obviously, that it has led to the 'over-judicialising' of the work of public bodies and drawn the judiciary into taking policy decisions. The panel is tasked with taking a view on whether the entire framework established by ss.3-4 requires change. This is especially so in respect of s.3 where the panel is required to consider whether outright repeal is needed, along with the implications this will have for legislative interpretations adopted before this takes effect.

A number of additional matters are also identified, including the remedies available to the courts following challenges to designated derogation orders, how courts have dealt with subordinate legislation, and the future of the remedial order process. However, the most politically significant is the application of the Act to public authorities operating overseas. This issue – territorial scope – has generated considerable concern among Conservatives, their resentment being fuelled by high profile legal actions against British service personnel serving in Afghanistan and Iraq.

The Government has promised to publish both the review's findings - which are due to be submitted to ministers this summer - and its response in due course.

Conclusion: What Next?

Inevitably, the gravity of the issues being considered by the Gross Review will ensure that the Government's response attracts considerable attention. Observers will no doubt also look to see whether, if he feels any recommendations do not go far enough, Mr Buckland's repeats what he did to the report of the Faulks review of administrative justice, i.e. grade it as 'C-' and order the work to be undertaken again; not by the panel but by any other interested parties.

In addition, however, given the evolution of Conservative policy since 2005, when the Government's final response is published it will be interesting to see the extent to which it is consistent with the more 'hard-line' reform proposals contained in *Protecting Rights in the UK*. In this respect, the following list highlights some of the questions that might guide Mr. Buckland in his thinking. All are drawn from Section 2 of *Protecting Rights*: 'The Plan for Change'.

- Will s.2 be amended to remove the domestic courts' duty to take ECtHR rulings into account?
- Will an amendment be enough, or will the government be even more prescriptive? One possibility, for example, is that the courts might be required to follow the approach of the Supreme Court in *R v Horncastle and others*.[29]
- Will legislation create new rules that the courts must follow when interpreting Convention rights? One possibility is that the *meaning* of at least certain Convention rights will be clarified in statute, in the words of *Protecting Rights* in order '…to ensure that they are applied in accordance with the original intentions of the Convention and *the mainstream understanding of rights*' (emphasis added).

[29] [2009] UKSC 14

- Examples given in the document include: clarifying and narrowing the meaning of 'degrading treatment or punishment' and that a foreign national who takes the life of another will be prevented from relying on the right to a family life in order to prevent her or his deportation
- On a similar theme, might legislation direct domestic courts to give the words in statutes their ordinary meaning, in order to express the intention of Parliament?
- Possibly running counter to the instructions given to the Gross Review, might the idea of a 'threshold' be revived, below which Convention rights '…will not be engaged'? In *Protecting Rights*, Conservative policy was that 'The use of…(human rights) law will be limited to cases that involve criminal law and the liberty of the individual, the right to property and similar serious matters'
- Finally, will the rules governing territorial application be amended by statute to ensure that British Armed Forces operating overseas are no longer subject to the Human Rights Act?

At the same time, howsoever Mr. Buckland responds, there remains a sense that at some point, he will have to acknowledge the 'elephant in the room'. This refers to the limited terms on which the review has been conducted. These excluded two inter-related issues (the 'elephant') of obvious constitutional and political significance: i.e. the scope of the rights set down in Schedule 1 of the Human Rights Act '…and the operation of the Convention or European Court of Human Rights'. If critics are right and that its main purpose is to 'soften' public opinion before the launch of a full-scale, frontal assault on both the Act and the Convention, the Gross review could merely be the first skirmish in a much longer war.

At the time of writing, nervousness among human rights-interested organisations over the eventual findings of the Gross review and the likely Government response is growing. This is evident in the reaction of a broad coalition of charities and other bodies, originally brought together by Humanists UK in February 2020, to the publication of the Judicial Review and Courts Bill on 21st July 2021.[30] Whilst acknowledging that this Bill does not extend to coverage of the Human Rights Act, the coalition is concerned that the ministerial attack on judicial review will be eventually replicated in an assault on the Act itself. Humanists UK, in particular, are fearful that despite the limited nature of the Gross review, the Government will at some future point look to repeal the Act, which it describes as proportionate and well-balanced, diluting its protections with a British Bill of Rights. In the meantime, the Joint Committee on Human Rights is continuing with its own short inquiry into human rights reform, which is running in parallel with the Gross review.

[30] Haroon Siddique, 'More than 220 groups criticise the UK review of the Human Rights Act', *The Guardian*, 22 July 2021.

EMPLOYMENT LAW

Workers and the gig economy: an appraisal of the Supreme Court's decision in the *Uber* case

Professor Robert Upex*

Introduction

This article will examine the decision of the Supreme Court in *Uber BV v Aslam*[1] and its implications for workers in what is called "the gig economy". It is important, however, to set that decision in context and to look at the ways in which over the years the legislature and the judges have approached the question of "status". By that term is meant the status in Employment Law of those who provide their work and skills for the benefit of others.[2]

The fact that a person does work for someone else does not mean that that person is necessarily an employee of that other. He or she may be an employee or a worker or self-employed. For convenience, the other person will be called "the employer", but that term is not meant to imply that those who provide their work and skills to the "employer" are employees. It is a term of convenience.

The first part of this article will look at the developments in the law and judicial thinking in relation to those customarily called "employees". The second part will chart the emergence of the concept of "worker". That in turn will lead to a consideration of the cases in which that concept has been considered by the higher courts and, finally, to a discussion and analysis of the Supreme Court's decision in the *Uber* case.

Employees, servants and workmen

The modern term for persons in this category is "employees", but that only emerged as a commonly used term in the second half of the 20th century. In the late 19th century and well into the 20th such persons were called either "workmen" (not "workers") or servants. As late as the 1960's, judges can be seen referring to them as "servants".[3] Indeed, for a considerable part of the 20th century the area now known as "Employment Law" was called the "Law of Master and Servant". This section will look at the terminology used in the legislation.

Employment protection legislation of the late 19th and early 20th centuries referred to "workmen". One of the first Acts of this type was the Employers' Liability Act 1880,[4] which enabled employees (to use contemporary parlance) to seek compensation from their employers for injuries suffered as a result of the negligence of a fellow-employee. The Act applied to "workmen", defined[5] as "a railway servant and anyone to whom the Employers and Workmen Act, 1875,[6] applies". The definition of "workman", in s.10 of the 1875 Act, excluded "domestic or menial servants" but went on to include "any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered

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[1] [2021] UKSC 5.

[2] The question of status is also relevant in the context of taxation and social security.

[3] In *Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance* [1968] 2 QB 497, for example.

[4] 43 and 44 Vict. c. 42

[5] In s.8 of the Act. See Lord Wilson's observations about this Act in *Pimlico Plumbers Ltd v Smith* [2018] ICR 1511, at paras. 8 and 9.

[6] 38 and 39 Vict. c. 90.

into or works under a contract with an employer, whether the contract . . . be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."[7] Thus, the definition applies to those engaged in manual labour. It is interesting to note that it uses terminology, which is later to be found both in the definition of "employee" and of "worker" in legislation passed almost 100 years later,[8] and that there was no separation between the two definitions. So, the term "workman" encompassed both the modern definition of "employee" and of the so-called "limb (b) worker". As will be seen, the modern definition includes some persons (but not all) who are self-employed.

The 1880 Act was replaced by the Workmen's Compensation Act, 1897.[9] This Act applied to "any person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise".[10] The employments covered by the Act were railways, mining and quarrying, factory work and laundry work. The courts interpreted the Act restrictively. In *Simpson v Ebbw Vale Steel, Iron and Coal Co*,[11] for example, the Court of Appeal refused to apply the Act to a colliery manager, on the grounds that, although the Act applied to non-manual workers, the victim must still "be a workman".[12] Collins, MR, said:[13]

> On going through the Act, it is obvious that its whole scheme rests on the fundamental interpretation that an ordinary person would put on the word 'workman'. It presupposes a position of dependence; it treats the class of workmen as being in a sense '*inopes consilii'*, and the Legislature does for them what they cannot do for themselves: it gives them a sort of State insurance, it being assumed that they are either not sufficiently intelligent or not sufficiently in funds to insure themselves. In no sense can such a principle extend to those who are earning good salaries. It is of course very difficult to draw the exact line, but it is easy in a particular case to say on which side of the line it falls.

The judge refers to "common parlance" and "the standard of the man in the street" - an approach reminiscent of the approach sometimes used by judges in later cases.

The Workmen's Compensation Act, 1906,[14] replaced the earlier legislation and widened its ambit. It excluded those employed "otherwise than by way of manual labour whose remuneration exceeds two hundred and fifty pounds a year".[15] It also excluded casual workers, those "employed otherwise than for the purposes of the employer's trade or business", policemen, outworkers or "a member of the employer's family dwelling in his house". It applied, however, to "any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is express or implied, is oral or in writing." Stripped of some of the express restrictions, this definition bears a striking similarity to the definition of "employee" used in the late 20th century legislation.

The legislation so far considered was replaced by the National Insurance (Industrial Injuries) Act 1946. As can be seen from this brief survey, the purpose of the legislation was to give a degree of protection to injured "workmen". The legislation of the post-1945 era was to provide greater protection for employees.

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[7] An idea of the Courts' approach to this legislation is to be found in *Morgan v The London General Omnibus Company* (1884) 13 QBD 832, in which the Court of Appeal held that the 1880 Act did not apply to a bus conductor. Brett MR expressed the view that the claimant did not fall within any of the categories set out in the 1875 Act, as he was not engaged in manual labour: see *ibid.* at p. 834.
[8] See below.
[9] 60 and 61 Vict. Cap. 37.
[10] Section 7.
[11] [1905] I KB 453.
[12] *Ibid.* at p. 457.
[13] *Ibid.* at p. 458.
[14] 6 Edw. 7 Cap. 58
[15] See s.13.

The first of the post-1945 Acts was the Contracts of Employment Act 1963[16] (repealed and replaced by the Contracts of Employment Act 1972) and the Redundancy Payments Act 1965. The other Acts of note were the Industrial Relations Act 1971, which introduced the right for employees not to be unfairly dismissed, and the Trade Union and Labour Relations Act 1974, which repealed much of the 1971 Act but retained the Act's provisions relating to unfair dismissal. All these Acts were consolidated into the Employment Protection (Consolidation) Act 1978. The definition of "employee" is to be found in s.153(1) of that Act, which stated:

> 'employee' means an individual who has entered into or works under […] a contract of employment.

"Contract of employment" was defined as

> a contract of service or apprenticeship, whether express or implied, and (if it is express) whether it is oral or in writing.

These definitions were continued in the latest consolidation Act, the Employment Rights Act 1996. They are to be found in s.230(1).

These definitions, being phrased in general terms, have given rise to an extensive body of case law. The starting point for a discussion of employment status is usually taken to be the decision of MacKenna J in *Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance*.[17] This is not the place to examine the ebbs and flows of judicial thinking over the years, since this article is concerned with the definition of "worker" rather than "employee".

The emergence of the statutory definition of ''worker''

In the post-1945 legislation, the term "worker" is first found in the Industrial Relations Act 1971.[18] By contrast, the legislation relating to discrimination used an extended definition of "employee" which has been interpreted by the courts to mean that legislation also applies to workers. This will be examined first, and then the definition of "worker" will be discussed.

The Discrimination Legislation definition

The first major piece of legislation in relation to discrimination was the Sex Discrimination Act 1975.[19] This was followed by the Race Relations Act 1976 and then by the Disability Discrimination Act 1995. The 1975 Act defined "employment" as

> employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly.[20]

There is no definition of "employee". The subsequent legislation used the same definition.[21]

The Equality Act 2010, which consolidated the pre-existing Acts and Regulations, defines "employment" as "employment under a contract of employment, a contract of apprenticeship or a

[16] For a comment on the Act, see Grunfeld (1964) 27 MLR 70.
[17] [1968] 2 QB 497.
[18] See s.167(1).
[19] The Race Relations Acts of 1965 and 1968 are not considered here.
[20] See s.82(1). The definition sections in the other two Acts are RRA, s. 78(1) and DDA, s. 68.
[21] See the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660), reg. 2(1), the Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661), reg. 2(1) and the Employment Equality (Age) Regulations (SI 2006/1031), reg. 2(1).

contract personally to do work."[22] In substance, the definition used in the Act is no different from the definitions used previously. As will be seen, it differs from the definition of "worker".

These definitions bear striking similarity to the definition of "workman" in s.10 of the Employers and Workmen Act, 1875. In view of the restrictive interpretation judges applied to these statutory provisions, it is likely that they would have considered that the definition applied only to employees (or "workmen", to use the terminology of that legislation). If someone claimed to come within the Act on the grounds that they had a contract to provide personal service, it is likely that the judges of that era would have applied the *eiusdem generis* rule of construction to such a person and held that they were an employee (to use contemporary parlance).

The main question to have arisen in relation to the above definition has related to the meaning of the phrase "contract personally to execute any work or labour". The first major case to consider this phrase was *Mirror Group Newspapers Ltd v Gunning*.[23] The respondent's father was an independent wholesale newspaper distributor who held an area distributorship from MGN in respect of their newspapers. His request to transfer the distributorship to his daughter was refused and she brought a complaint of unlawful sex discrimination. The Court of Appeal held that the dominant purpose of the relevant statutory provision[24] was the execution of personal work or labour, whereas the facts of the case showed that the dominant purpose of the father's contract with MGN was the regular and efficient distribution of newspapers. He had failed to show that he was obliged to engage personally in the execution of the contract. The decision in this case is consistent with earlier decisions under the 19th century legislation discussed earlier.[25] It is clear from those cases that it was not sufficient that the person *may* do the work or some of it personally; provided, however, that the person contracted to do at least some of the work personally, it did not matter that he or she had assistants. It should be borne in mind, however, that the question in the earlier cases was whether the individual was a workman (employee) or not.

In view of the fact that the words used in the Equality Act 2010 are very similar to those used in the 1875 Act, it would have been open to the courts to conclude that the Equality Act only applied to employees. The point at which this definition was equated with the statutory definition of "worker" can be identified in *Bates van Winkelhof v Clyde & Co LLP*.[26] In that case, Baroness Hale of Richmond DPSC (as she then was) observed that the definition in the Equality Act yielded a result similar to the exclusion of work for those with the status of a client or customer in s.230(3) of the 1996 Act. The effect of her judgment was thus to assimilate the two definitions. Later, in commenting on this approach, Lord Wilson JSC observed that the distinction between the two definitions was one without a difference,[27] and treated Baroness Hale's decision as settled.[28]

The statutory definition of "worker"

The Industrial Relations Act 1971 was the first of the post-1945 Acts to give a definition of a "worker". Section 167(1) of the Act states:

> 'worker' means an individual regarded in whichever (if any) of the following capacities is applicable to him . . . as a person who seeks or normally seeks to work –
>
> (a) under a contract of employment, or

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[22] Equality Act 2010, s.212(2), read with s.83(1).
[23] [1986] ICR 145.
[24] SDA 1975, s.82(1).
[25] For examples, see *Weaver v Floyd* (1852) 21 LJOB 151, *Ingram v Barnes* (1857) 7 E&B 115, *Pillar v Llynvi Coal & Iron Co Ltd* (1869) LR 4 CP 752, *Marrow v Flimby & Broughto Moor Coal & Fire Brick Co Ltd* [1898] 2 QB 588 and *Squire v Midland Lace Co* [1905] 2 KB 448.
[26] [2014] UKSC 32, at paras. 31 and 32. The core of Lady Hale's reasoning is to be found in paras. 31-39 of her judgement.
[27] In *Pimlico Plumbers v Smith* [2018] ICR 1511, at para. 14.
[28] *Ibid.* at para. 15.

(b) under any other contract (whether express or implied, and, if express, whether oral or in writing) whereby he undertakes to perform personally any work or service for another party to the contract who is not a professional client of his . . .

The 1971 Act was repealed by the Trade Union and Labour Relations Act 1974, which re-enacted some of the 1971 Act's provisions. The definition of "worker" used in the 1971 Act was re-enacted in identical terms in the 1974 Act.[29] When that Act came to be consolidated into the Trade Union and Labour Relations (Consolidation) Act 1992, the definition of "worker" remained substantially the same.[30]

The statutory provisions so far considered relate to what is called "collective labour law", the law relating to the relationship between employers and trade unions.

The significance of the definition in the present context, however, is that it increasingly came to be used as employment protection rights were extended during the 1990's. Some of the legislation extending those rights was passed because of the UK's obligation to implement the provisions of EU Law into the domestic law of the United Kingdom.[31] In other cases, the legislation implemented an election manifesto commitment.[32] Both the Working Time Regulations 1998 and the National Minimum Wage Act 1998, for example, use a very similar definition of "worker" as the definition used in the Industrial Relations Act 1971 (above).[33] The only difference is that, instead of the phrase "who is not a professional client of his", the legislation substitutes the phrase "whose status is not by virtue of the contract that of a client or customer of any professional or business undertaking carried on by the individual". On the face of it, the new definition is wider than the definition in the 1971 Act.

The definition used in the Working Time Regulations and the National Minimum Wage Act is also in the Employment Rights Act 1996, which is a consolidation of the previous enactments relating to individual employment law. It uses the same definition of "worker" as those two measures. Because its provisions will be discussed extensively in the discussion of the relevant case law, it is set out in full here. Section 230(3) states:

> In this Act 'worker' . . . means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual . . .

Thus, all employees are workers as they are included in paragraph (a) of the definition. Workers who fall within paragraph (b) are usually called "limb (b) workers" and are referred to as such by the judges. This usage will be followed in the discussion of the case law below.

A summary of the present position

It may be helpful to summarise the present position before discussing the case law relating to workers.

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[29] TULRA 1974, s.30(1).
[30] TULR(C)A 1992, s.296(1).
[31] For example, the Working Time Regulations 1998 (SI 1998 No 1833).
[32] For example, the National Minimum Wage Act 1998.
[33] See reg. 2(1) of the WTR and s.54(3) of the NMWA.

Until the 1990's, when employment protection measures increasingly conferred rights on workers, Employment Law protected employees and did not protect the self-employed. The term "worker" was usually confined to legislation dealing with collective labour law, as has been seen. The definition of "employment" in the equality legislation was held to give rights to a wider group than "employees" and thus emerged the notion that in certain circumstances the self-employed might enjoy the protection of legislation.

The consequence of the emergence of the concept of the "worker" has been to complicate the legal position. The position – as far as Employment Law is concerned – is that there are two groups who may enjoy protection depending on the wording of the relevant legislative provisions. The self-employed enjoy no statutory rights when those statutory rights are confined to "employees". They do, however, enjoy statutory rights if the legislative provisions extend to "workers" *and* they fall within the definition. But, not all self-employed persons fall within the definition. As Baroness Hale of Richmond observed in *Bates van Winkelhof v Clyde & Co LLP*:[34]

> [E]mployment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but do not fall within the second class. Discrimination law, on the other hand, while it includes a contract 'personally to do work' within its definition of employment . . . does not include an express exception for those in business on their account who work for their clients or customers. But a similar qualification has been introduced by a different route.

This leads to the anomaly that a person may be self-employed for tax purposes but also given a measure of employment protection. So, far as the tax legislation is concerned,[35] the two categories of persons liable to pay income tax remain employees[36] and the self-employed.[37] Tribunals called upon to decide into which category a taxpayer falls apply the same tests to determine their status as those applied by employment tribunals when deciding whether someone is an employee.[38] The consequence of the emergence of the "worker" concept is that a person may be classified as self-employed for tax purposes, but as a worker for statutory Employment Law purposes. This is hardly conducive to clarity.

The pre-*Uber* case law

Introduction

A useful starting point for a discussion of the case law is the judgment of Aikens LJ in *Autoklenz v Belcher*.[39] The judge said this:

> The second 'sub-group' of 'worker' is a person who fulfils the requirements set out in para. (b) of s.230(3) of the ERA. . . There are three requirements. Two are positive and one is negative. First, the worker has to be an individual who has entered into or works under a contract with another party for work or services. . . The second requirement . . . is that the individual undertakes to do or perform personally the work or services for the other party. If . . . the parties have agreed a contractual term whereby the individual can sub-contract performance of the work or services to another person, then the individual will not have

[34] [2014] UKSC 32, at para. 31.
[35] And other legislation, for example the Social Security legislation.
[36] See Income Tax (Earnings and Pensions) Act 2003, s. 4. Employees previously paid tax under what was called Schedule E.
[37] See Income Tax (Trading and Other Income) Act 2005, s. 5. The self-employed previously paid tax under what was called Schedule D.
[38] See *Hall v Lorimer* [1992] ICR 739, *per* Mummery J (as he then was), at p. 743.
[39] [2010] IRLR 70, at paras. 75-77.

> undertaken to perform the work or services personally and so will not be within the definition of 'worker' set out in para. (b). The third requirement relates to the status of the other party to the contract. That other party must not, by virtue of the contract, have the status of a client or customer of any profession or business undertaking carried on by the individual who is to perform the work or services. No further explanation of what is meant by a client or customer of a profession or business undertaking is given, but, in most cases at least, it is easy enough to recognise someone who has this status. It includes, for example, the solicitor or accountant's client or a customer who seeks and obtains services of a business undertaking such as from an insurance broker or pension's adviser.

Before considering the decision in *Uber*, it will be convenient to look at decisions dealing with the second and third requirements. In *Uber* itself it was the first requirement that was considered by the Supreme Court. Uber conceded that the other two requirements were met.[40]

The requirement to perform the work or services personally

As Lord Wilson observed in the *Pimlico Plumbers* case,[41] "an obligation of personal performance is also a necessary constituent of a contract of service." He went on to observe that decisions in that field "can legitimately be mined for guidance as to what, more precisely, personal performance means in the case of a limb (b) worker."[42]

If one looks at those decisions, it is possible to see some of the boundaries between the obligation to provide personal service and the right to substitute. So, for example, in *Express & Echo Publications Ltd v Tanton*,[43] the Court of Appeal held that a term of the contract which provided that "in the event that the contractor is unable or unwilling to perform the services personally he shall arrange at his own expense entirely for another suitable person to perform the service" defeated a claim to be an employee. On the other hand, in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*,[44] MacKenna J observed that an occasional or limited power of delegation might not be inconsistent with a contract of employment. In *Pimlico Plumbers* itself, Mr Smith was given a contract in 2009. The contract referred to a manual which was incorporated into his contract.[45] Lord Wilson examined the provisions of the two documents and concluded that the only right of substitution was of another Pimlico operative. In doing so, he upheld the Employment Tribunal judge's conclusion that there was no unfettered right to substitute at will.[46] He then went on to say:[47]

> [T]here are cases, of which the present is one, in which it is helpful to assess the significance of Mr Smith's right to substitute another Pimlico operative by reference to whether the dominant feature of the contract remained personal performance on his part.

He went through the terms of the 2009 contract and concluded that the tribunal was entitled to decide that the dominant feature of Mr Smith's contracts with Pimlico was an obligation of personal performance.[48]

Customer or client?

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[40] [2021] UKSC 5, at para. 42.
[41] *Pimlico Plumbers v Smith* [2018] ICR 1511, at para. 20.
[42] Ibid.
[43] [1999] ICR 693.
[44] [1968] 2 QB 497, 515.
[45] *Pimlico Plumbers v Smith* [2018] ICR 1511, at para. 19.
[46] *Ibid*. at para. 25.
[47] *Ibid*. at para. 32.
[48] *Ibid*. at para. 34.

Lord Wilson JSC said of this part of the definition in the *Pimlico Plumbers* case:[49] "It is unusual for the law to define a category of people by reference to a negative – in this case to another person's lack of a particular status." He quoted the view of the judge in *Bryne Bros (Formwork) Ltd v Baird*[50] - that the requirement that the other party to the contract should be neither a client nor a customer was clumsily worded – and said: "It is hard to disagree."[51]

The third part of the definition was considered by the Court of Appeal, in *Hospital Medical Group Ltd v Westwood*.[52] The case involved a general practitioner who contracted to provide hair restoration services to HMG. The contract described him as a self-employed independent contractor and was expressed to be a contract for services. He engaged to provide his services personally and supplied his own professional indemnity insurance. Dr Westwood claimed to be a worker, *inter alia*. The Court of Appeal upheld his claim and held that HMG did not have the status of a client in relation to him. The Court considered earlier decisions of the Employment Appeal Tribunal, in which the EAT had considered this issue.[53] In *Cotswold Developments Construction Ltd v Williams,*[54] *Langstaff J said:*

> [I]t seems plain that a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls.

In relation to this observation, Maurice Kay LJ said:[55]

> I do not consider that there is a single key with which to unlock the words of the statute in every case. On the other hand, I agree with Langstaff J that his "integration" test will often be appropriate, as it is here.

The judge agreed that Dr Westwood was an integral part of HMG's business and so a worker in relation to it.[56]

The *Uber* case

The basic issue in the case was set out by Lord Leggatt at the start of his opinion:[57]

> The central question on this appeal is whether an employment tribunal was entitled to find that drivers whose work is arranged through Uber's smartphone application ('the Uber app') work for Uber under workers' contracts and so qualify for the national minimum wage, paid annual leave and other workers' rights; or whether, as Uber contends, the drivers do not have these rights because they work for themselves as independent contractors, performing services under contracts made with passengers through Uber as their booking agent.

Therefore, the first requirement of ERA 1996, s.230(3) was engaged here. As a preliminary to examining this issue, it is important to examine the contractual provisions which were involved. There

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[49] *Pimlico Plumbers v Smith* [2018] ICR 1511, at para. 35.
[50] [2002] ICR 667, at para. 16.
[51] *Loc. cit.* at para. 35.
[52] [2013] ICR 415.
[53] *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181 and *James v Redcats (Brands) Ltd* [2007] ICR 1006.
[54] *Loc. cit.* at para. 53.
[55] *Loc. cit.* at 427.
[56] See also *Suhail v Barking Havering & Redbridge University Hospitals NHS Trust* (2015) UKEAT/0536/13 and *Gunny v Great Ormond Street Hospital for Children NHS Foundation Trust* (2018) UKEAT/0241/17.
[57] [2021] UKSC 5, at para. 1. His opinion was the opinion of the entire Court.

were two groups of provisions: those relating to use of the app by the drivers and those relating to the use of the app by potential passengers.

The contractual provisions

Before using the app for the first time drivers were required to sign a 'partner registration form'. The nature of the agreement was that Uber BV (the holding company[58]) agree to provide electronic services to the driver. These included access to the Uber app and payment services. The effect of Clause 2.3 of this agreement was expressed to be that when the driver (called in the agreement "Customer") accepted a request from a potential passenger (called "User"), the driver was responsible for providing transportation services to the passenger and "creates a legal and direct business relationship between Customer and the User, to which neither Uber nor any of its affiliates . . . is a party". Clause 4.1 of the Agreement provided that the drivers appointed Uber BV as their "limited agent for the purpose of accepting the Fare . . . on behalf of the Customer" and agree that "payment made by User to Uber BV shall be considered as payment made directly by User to Customer."

So far as potential passengers are concerned, they are required to accept written terms and conditions, called the "Rider Terms". Clause 3 of these terms states as follows:

> Uber UK accepts PHV Bookings acting as disclosed agent for the Transportation Provider (as principal). Such acceptance by Uber UK as agent for the Transportation Provider gives rise to a contract for the provision to you of transportation services between you and the Transportation Provider (the 'Transportation Contract'). For the avoidance of doubt: Uber UK does not itself provide transportation services, and is not a Transportation Provider. Uber UK acts as intermediary between you and the Transportation Provider. You acknowledge and agree that the provision to you of transportation services by the Transportation Provider is pursuant to the Transportation Contract and that Uber UK accepts your booking as agent for the Transportation Provider, but is not a party to that contract.

It is clear that the intended effect of the agreement between (i) Uber BV and the drivers and (ii) Uber BV and potential passengers was to provide for a contract to come into existence between the driver and the passenger, as would be the case if the driver were, for example, a driver of a "black cab". If this effect were held to be achieved then the first requirement of ERA, s.230(3) would not be complied with and the argument that a driver was a worker within its provisions would fail.

The crux of Uber's argument was that Uber London (the subsidiary licensed to operate private hire vehicles in London) acted as an agent for drivers when accepting private hire bookings. This argument was rejected by the Supreme Court. As has been seen, the "Rider Terms" stated that Uber London accepted private hire bookings as agent for the driver and that such acceptance gave rise to a contract between the passenger and the driver. Lord Leggatt, giving the opinion of the Court, said:[59]

> It is, however, trite law that a person (A) cannot create a contract between another person (B) and a third party merely by claiming or purporting to do so but only if A is (actually or ostensibly) authorised by B to act as B's agent.

He went on:[60]

> In accordance with basic principles of contract and agency law, therefore, nothing stated in the Rider Terms is capable of conferring authority on Uber London to act as agent for any

[58] One of the holding company's subsidiaries is Uber London Ltd, which is licensed to operate private hire services in London. Another subsidiary, Uber Britannia Ltd, holds licenses to operate private hire vehicles outside London.
[59] [20321] UKSC 5, at para. 50.
[60] Ibid. at para. 51.

> driver (or other "Transportation Provider") nor of giving rise to a contract between a rider and a driver for the provision to the rider of transportation services by the driver.

This led him to the conclusion that, by accepting a booking, Uber London contracted as principal with the passenger to carry out that booking and, therefore, that it would have no means of performing its contractual obligations to passengers or of obtaining compliance with its regulatory obligations as a licensed operator under the Private Hire Vehicles (London) Act 1988 without either employees or sub-contractors to perform driving services for it.[61] In other words, to operate its business Uber London needed to enter into contracts with drivers to provide services.

Although that conclusion would have been sufficient to dispose of the appeal, Lord Leggatt went on to deal with Uber's arguments relating to the basis for dealing with the question whether an individual is a "worker" within the legislation. This involved a consideration of the Supreme Court's previous decision in *Autoklenz Ltd v Belcher*.[62]

Autoklenz Ltd v Belcher

In that case, the sole judgment was given by Lord Clarke of Stoke-cum-Ebony. It is not necessary to set out the facts of the case here, but Lord Clarke concluded his discussion of the approach to dealing with cases involving those claiming to be workers by saying:

> So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem.[63]

Applying that approach, he concluded that the employment tribunal was entitled to decide that the contractual documents did not reflect the true agreement between the parties and that it was entitled to conclude that they were workers. Lord Leggatt pointed out that the theoretical justification for this approach was not fully spelt out in Lord Clarke's judgement and went on to say:[64]

> Critical to understanding the *Autoclenz* case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunals and the courts was not, unless the legislation required it, to identify whether, under the terms of their contracts, Autoclenz had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It was to determine whether the claimants fell within the definition of a 'worker' in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation.

He went on to set out the modern approach to statutory interpretation as being "to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to its purpose".[65] From this starting point, he went on to consider two issues: (i) the purpose of protecting workers; and (ii) restrictions on contracting out of the statutory provisions.

The purpose of protecting workers

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[61] Ibid. at para. 56.
[62] [2011] UKSC 41.
[63] *Loc. cit.* at para. 35.
[64] *Loc. cit.* at para. 69.
[65] *Loc. cit.* at para. 70.

He took as his starting-point the observations of Mr Recorder Underhill QC (as he then was) in *Byrne Bros (Formwork) Ltd v Baird*:[66]

> [T]he policy behind the inclusion of limb (b) ... can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees *stricto sensu* . . . The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects.

In view of the fact that the Working Time Regulations 1998 implemented Directive 93/104/EC on working time, he went on to consider the approach of the European Court of Justice to the question of whether someone is a worker. In *Allonby v Accrington and Rossendale College*,[67] which considered the meaning of worker in the context of the EC Treaty provisions relating to equal pay for equal work,[68] the Court said:[69]

> there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration."

The court added[70] that the authors of the Treaty clearly did not intend that the term "worker" should include "independent providers of services who are not in a relationship of subordination with the person who receives the services".[71]

In later cases in which the Court was specifically concerned with the meaning of the term "worker" in the context of the Working Time Directive, it identified the essential feature of the relationship between employer and worker in the same terms as in the *Allonby* case.[72] In the most recent case, *Syndicatul Familia Constanta v Directia Generala de Asistenta Sociala siProtectia Copilului Constanta,*[73] the Court of Justice said: "[i]t follows that an employment relationship [i.e. between employer and worker] implies the existence of a hierarchical relationship between the worker and his employer." The Supreme Court followed this approach in *Hashwani v Jivraj*.[74] It held that an arbitrator was not a person employed under "a contract personally to do any work" for the purposes of the relevant provisions of the discrimination legislation and so not a worker for the purpose of provisions which expressly refer to workers.

This analysis led Lord Leggatt to the conclusion that "it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a 'worker'." He went on:[75]

> To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the

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[66] [2002] ICR 667, at para. 17.
[67] Case C-256/01, [2004] ICR 1328.
[68] At that time, Article 141.
[69] *Loc. cit.*, at para. 67.
[70] *Loc. cit.*, at para. 68.
[71] For a fuller discussion of this issue in the context of EU private law, see Upex and Cavalier, "The Concept of the Employment Contract in European Union Private Law" (2006) 55 ICLQ 587.
[72] These cases are referred by Lord Leggatt in para. 72 of his opinion.
[73] Case C-147/17), [2019] ICR 211, at para. 41.
[74] [2011] UKSC 40. See also Baroness Hale in *Bates van Winkelhof v Clyde & Co* [2014] UKSC 3e2, at para. 39.
[75] *Loc. cit.* at paras. 76 and 77.

> individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. . . In these circumstances to treat the way in which the relationships between Uber, drivers and passengers are characterised by the terms of the Services Agreement as the starting point in classifying the parties' relationship, and as conclusive if the facts are consistent with more than one possible legal classification, would in effect be to accord Uber power to determine for itself whether or not the legislation designed to protect workers will apply to its drivers.

Restrictions on contracting out

Lord Leggatt continued by saying that the purposive approach under discussion was further justified by the fact that statutes or regulations which confer rights on workers contain restrictions on contracting out. He cited as an example s.203(1) of the Employment Rights Act 1996, which provides a paradigm of the sort of wording which is usually found.[76] It states:

> Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports –
>
> (a) to exclude or limit the operation of any provision of this Act, or
>
> (b) to preclude a person from bringing any proceedings under this Act before an employment tribunal.

Referring to the provisions contained in the Services Agreement considered earlier (clauses 2.3 and 2.4), he pointed out that the effect of those provisions was to exclude or limit the operation of the relevant statutory provisions and, therefore, that they were void.[77]

This approach to the issue is notable for the fact that the judge expressly refers to and relies upon the contracting out provisions contained in the relevant legislation. There are few previous cases that have done so.

Conclusions

The main question raised by the *Uber* case is this: what effect is it likely to have on the rights of workers in the gig economy?

The first point to make is that, in the light of the Supreme Court's approach to the question, the wording of individual contracts will be of less importance. The task for a court or tribunal will be to decide whether the status of an individual is that of a worker. This will inevitably proceed on a case-by-case basis since the facts of one case are not replicated in another. The significant feature of the *Uber* case is the (unsuccessful) attempt by Uber to create a contractual relationship between the drivers and the passengers. Part of the reason for the failure of its appeal to the Supreme Court was the fact that the sector involved is subject to a regulatory regime which, as Lord Leggatt observed, necessitates a contractual relationship between the entity operating the app (Uber BV) and those wishing to avail themselves of its services – in this case the drivers and passengers. Different considerations will arise where the providers of the app operate in a different set of circumstances.[78] In all cases, it will be a question whether the reality of the situation is that the individual is a worker. Matters such as contractual terms will be one of the factors to be taken into account.

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[76] See also the National Minimum Wage Act, s. 49(1) and the Working Time Regulations 1998, reg. 35(1).
[77] *Loc. cit.* at para. 82.
[78] In cases at ET/EAT level involving City Sprint, Hermes and Addison Lee bicycle couriers, delivery drivers and private hire firm tax drivers, respectively, have been held to be workers. See *Dewhurst v CitySprint UK Ltd* ET/2202512/2016, *Leyland v Hermes Parcelnet Ltd* (ET) and *Addison Lee Ltd v Lange* [2018] UKEAT 0037/18/1411.

An example of this point is recent litigation involving Deliveroo. The litigation does not involve the rights that were in issue in the *Uber* case; it involves collective bargaining rights and, therefore, a different litigation route.[79] Nevertheless, the status of Deliveroo drivers, known by Deliveroo as "Riders" is a relevant issue. The applicable legislation is the Trade Union and Labour Relations (Consolidation) Act 1992, and "worker" is defined in the same terms as in ERA 1996, s.230(3).[80] The relevant contractual provisions were contained in a contract headed "Supplier Agreement", clause 8 of which gave Riders the right to appoint substitutes. Clause 2(3) also made clear that Riders could work for other parties, including competitors of Deliveroo. The CAC accepted that the substitution right was genuine and that in practice a few Riders did exercise their right to appoint substitutes. That led to their conclusion that the Riders were genuinely self-employed and, therefore, not workers. This conclusion was upheld by Supperstone J.

As can be seen, the decision that Deliveroo Riders were not workers related to a different issue to that raised in the *Uber* case. Deliveroo did not dispute that there was a contract between them and the Riders. Their contention was that the contract was not a contract "whereby the individual undertakes to do or perform personally any work or service", a point which was not in issue in the *Uber* case. At the time of writing, the Court of Appeal's decision had yet to be delivered. Whatever the outcome, however, it is likely to shed little, if any, additional light, simply because of the different contractual provisions applicable to Deliveroo Riders. It also sheds no light on the contractual relationship between consumers and Deliveroo, since that was not in issue in the proceedings.

Although it would be premature to exult over the Supreme Court's decision in the *Uber* case – and certainly premature to claim that all gig economy workers have the status of Limb (b) workers, it is possible to make a number of points with a reasonable degree of certainty. First, as has been pointed out, the contractual provisions applicable to the individual will be of relevance, but will only be a factor in the equation. Second, a court or tribunal will look carefully at how in practice the individual has performed the contract and whether, for example, there has been delegation of the work. Third, bearing in mind that the issue of whether a person is a worker is a matter of statutory interpretation, those drafting contracts for organisations involved in the gig economy will need to be alert to the risk that the court or tribunal will follow the Supreme Court's approach in *Uber* and declare the provision to be one which has the effect excluding or limiting the operation of the relevant legislation and is, therefore, void.

So, the question is: where next? It will be recalled that in 2017 the Taylor Report appeared.[81] Section 5 deals with what it calls "Clarity in the Law". In examining the present state of the law it comments on the fact that agreeing on the correct status for individuals, particularly those involved in various types of casual work, depends on the individual facts of each case. It points out that the courts have tried to provide clarity by introducing tests or factors but goes on to say: ". . .the relevance and weight given to these varies depending on the circumstances; without an encyclopaedic knowledge of case law, understanding how this might apply to your [sic] situation is almost impossible".[82] This leads it to two conclusions in relation to this matter.

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[79] The case involved an application to the Central Arbitration Committee by the Independent Workers' Union of Great Britain that it should be recognised for collective bargaining purposes by Deliveroo. The CAC rejected the application and the Union applied for judicial review of that decision: see *R, ex parte Independent Workers' Union of Great Britain v Central Arbitration Committee and Roofoods Ltd t/a Deliveroo* [2018] EWHC 3342 (Admin). Supperstone J rejected the application. The case was heard on appeal by the Court of Appeal early in 2021 and on 24 June 2001, the Court of Appeal dismissed the Appeal, finding that the CAC was entitled to conclude that the riders were not workers and thereby not entitled to join a trade union as covered by Article 11 of the Convention.

[80] By s.296(1).

[81] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_date/file/62761/good-work-taylor-review-modern-working-practice-rg.pdf.

[82] Ibid. at p. 33.

First, it concludes that the Government "should replace the minimalistic approach to legislation with a clearer outline of the tests for employment status, setting out the key principles in primary legislation, and using secondary legislation and guidance to provide more detail."[83] Second, it proposes that the current three-tier approach to employment status should be retained, but that those who are eligible for worker rights but who are not employees should be renamed 'dependent contractors'.[84] Although it rejects arguments that this approach should be aligned to the binary choice used in the tax system,[85] it goes on to suggest that in developing the new 'dependent contractor' test attempts should be made "to align the employment law status framework with the tax status framework. This is to ensure that differences between the two systems are reduced to an absolute minimum".[86] It leaves vague the methods by which this might be achieved. The Government's response in 2018 broadly accepted these recommendations.[87] In addition, in 2020, some relatively minor changes were made to the legislation.[88]

At first sight, the argument that the determination of status should be left to primary and secondary legislation is attractive. Bearing in mind, however, that employment protection legislation going back over 100 years has not attempted to go into detailed definitions, and has been content to leave the question of status to the courts, there is no reason to suppose that secondary legislation would be any better at addressing the issues than the courts. If anything, it would lack the suppleness that enables the courts and tribunals to consider the facts of individual cases. Equally, although there is a superficial attraction in the argument that there should be a three-tiered approach to employment status, the Taylor report is light on detail as to how an alignment between tax law and employment law frameworks might be achieved if a three-tiered approach is retained.

At the end of the day, it would be better to bite the bullet and accept that there should be two categories of employment status, but go on to define the status of 'employee' in such a way as to include 'dependent workers'. In other words, if one accepts that 'dependent workers' need protection, the logical corollary of that is to accept that their status should be aligned with employees. That would leave two statuses: 'workers' and 'self-employed', a framework which could be equally applied to tax law. It would require relatively little legislative effort to achieve such a change. A binary definition would not, however, remove the hard cases that crop up. Nor would it resolve the problems caused by employments with an irregular work pattern. But then no construct, however perfect, is capable of addressing all the vagaries inherent in the patterns of working life in the context of the demands of a modern economy.

[83] Ibid.
[84] Ibid. at p. 33.
[85] Ibid.
[86] Ibid. at p. 38.
[87] https://www.gov.uk/government/publications/government-response-to-the-taylor-review-of-modern-working-practices
[88] The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 (SI 2020 No. 1378, w.e.f. 6 April 2020.

Fifty years after *Handyside*: restricting free speech on grounds of public morality

Dr Steve Foster*

Introduction

It is now fifty years since Richard Handyside was prosecuted under the Obscene Publications Act 1959 for having in his possession for publication copies of *The Little Red Schoolbook*, a pamphlet providing liberal sexual advice to young persons. The prosecution told us much about both the prosecution policy on obscenity and the public morals of the establishment in the United Kingdom at the time. However, the case became even more famous for the subsequent appeal to the European Court of Human Rights. In *Handyside* v *United Kingdom,*[1] the Court accepted that the domestic authorities should be given a wide margin of appreciation in regulating speech that conflicts with public morality, stressing that the domestic authorities were better placed than the international judge to assess the necessity and proportionality of such laws.[2] Accordingly, as detailed below, the Court found that the interference with Handyside's free speech was necessary and proportionate, despite the fact that other European countries had not taken legal action against the publication.

Indeed, the subsequent case law of the European Court shows a marked reluctance to attack the domestic laws of blasphemy, indecency and obscenity, accepting that such laws intended to uphold public morality, or to safeguard the sensibilities of certain sections of society.[3] This has led to a relatively low level of protection of literary and artistic speech by the European Court, in contrast to other forms of constitutional speech; an approach generally followed in the domestic courts.[4]

This short article will revisit the case of *Handyside*, both to celebrate the fiftieth anniversary of the initial prosecution, and, to a lesser extent, to assess the importance of the European Court's decision with respect to the control of 'offensive' speech. It does so in the full realization that times have changed and that many of the decisions examined in the article are of purely historical and academic interest. The cases were, at the time, *cause celebre,* and their prosecution and defence indicative of the establishment's fight to safeguard public morality, and the new guard's duty to insist on a more liberal approach to these matters.

Fifty years on, the content of the material appears harmless, lame and passe; their prosecution inexplicable and fruitless. That is not to say that the regulation of 'offensive' speech is no longer relevant or lacking controversy. The regulation of hate speech is very much on the legal and moral agenda, and in particular, the balance between free speech and the protection of religion and religious sensibilities is the source of intense debate and differences of moral, ethical opinion.[5] There has, also, been a shift from protecting *public* morality, prevalent from the 1950's, to ensuring that *individuals* are not harmed or offended, the main aim of regulated speech at present. The article recognises this ongoing

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[1] (1976) 1 EHRR 737.

[2] In that case, the European Court upheld the prosecution of the applicant for obscenity for distributing a publication that was freely available in most other parts of Europe, holding that the prosecution was both necessary and proportionate.

[3] See *Müller* v *Switzerland* (1988) 13 EHRR 212, *Otto-Preminger Institute* v *Austria* (1994) 13 EHRR 34, and *Wingrove* v *United Kingdom* (1996) 24 EHRR 1, considered below.

[4] Notably in *R v Gibson and Sylverie,* below, and *R v Gay News and Lemon* [1979] 1 All ER 898.

[5] See Steve Foster, 'Accommodating Intolerant Speech: Religious Free Speech Versus Equality and Diversity' (2019] 6 European Human Rights Law Review, 609.

debate, but will focus on *Handyside*, and the regulation of speech that threatens, or at least threatened at the time, public morality, in particular sexual morality. The author recognizes that much of what follows is of historical significance, and the intention is to provide an insight into the suppression of immoral speech before the millennium, since which time new challenges to offensive free speech have arisen.

The prosecution of the Little Red Schoolbook: *R v Handyside*; *Handyside v United Kingdom*

The applicant owned the British publishing rights in the *Little Red Schoolbook*, a Danish publication that had been translated into several languages and sold in different countries.[6] The publication was intended as a reference book on sexual matters and contained chapters on topics such as abortion, homosexuality, sexual intercourse and masturbation. Several hundred review copies were distributed and the book was advertised for sale at 30 pence. After several thousand copies had been sold in the United Kingdom, a number of complaints were received and the Metropolitan Police obtained a warrant to search the applicant's premises. A number of copies were seized during the search and the applicant was subsequently charged under s.1 of the Obscene Publications Act 1959 with having in his possession for gain several hundred copies of an obscene publication. He was fined £50 by the magistrates' court, and after his appeal to the Inner London Quarter Sessions was unsuccessful the remainder of the books were destroyed. Subsequent, unsuccessful, prosecutions were brought in Scotland, but no proceedings were brought in Northern Ireland, the Isle of Man or the Channel Islands, and the book circulated freely in most European countries. A revised edition of the book was allowed to circulate freely.

The applicant registered a complaint under the European Convention, claiming that the seizure and destruction of the books was contrary to his right of freedom of expression under Article 10, and of his right to peaceful enjoyment of possessions under Article 1 of the First Protocol. The European Commission on Human Rights declared the application admissible, but found no violation on the facts and referred the case to the European Court of Human Rights.

The Court found that the applicant's criminal conviction and the seizure and destruction of the books was undoubtedly an interference with his Convention right to freedom of expression, thus constituting a violation unless falling within one of the exceptions provided by Article 10(2). It was also accepted by the Court and by the applicant that the interference was prescribed by law in that it had a legal basis in the Obscene Publications Acts 1959/1964, and that the Act had been correctly applied in the present case. Thus, the Court merely had to decide whether the interference was necessary in a democratic society for the purpose of achieving the legitimate aim of the protection of morals and the rights of others. The Court found that the Act had the legitimate aim of the protection of morals in a democratic society.[7] Accordingly, the question for the Court was whether the restriction was necessary in a democratic society for that legitimate purpose. In this respect, the Court attempted to lay down the rules on determining whether an actual restriction or penalty was necessary in a democratic society.

The Court stressed that machinery of protection established by the Convention was subsidiary to the national legal systems safeguarding human rights in that the Convention leaves to each contracting state, in the first place, the task of securing the rights and freedoms it enshrines. Thus, the Convention machinery only becomes involved through contentious proceedings and after all domestic remedies have been exhausted. This, in the Court's opinion, applied notably to Article 10(2) of the Convention. In particular, it was not possible to find in the domestic law of the various states a uniform conception of morals. The view taken by their respective laws of the requirements of morals varies from time to

[6] The book was written by Søren Hansen and Jesper Jensen, was first published in 1969, and was republished in 2014.

[7] The Court later rejected a claim that the book had been penalised purely for its anti-authoritarian views and that accordingly the restriction was not imposed for a legitimate purpose.

time and from place to place, especially in our era that is characterised by a rapid and far-reaching evolution of opinions on the subject:

> By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as the 'necessity' of a 'restriction' or 'penalty' intended to meet them.

The Court then considered the meaning of the word 'necessary' in the context of Article 10(2). In the Court's view, while the word was not synonymous with 'indispensable', neither did it have the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'. Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context. Consequently, Article 10(2) leaves to the contracting states a margin of appreciation, this margin being given both to the domestic legislator and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force. Nevertheless, the Court noted that Article 10(2) does not give the state an unlimited power of appreciation. The Court is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression. Thus, the domestic margin of appreciation goes hand in hand with European supervision, such supervision concerning both the aim of the measure challenged and its necessity, and covering not only the basic legislation but also the decision applying it, even one given by an independent court.

The Court then turned its attention to the principles of a democratic society. In its view, the Court was obliged to pay respect to the principles of such a society and noted that freedom of expression constituted one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic 'society'. This, in the Court's view, means that every formality, condition, restriction or penalty imposed must be proportionate to the legitimate aim pursued.

On the other hand, the Court noted that a person who exercises his freedom of expression undertakes 'duties and responsibilities', the scope of which depends on his situation and the technical means he uses. The Court must take this into account when deciding whether the 'restrictions' or 'penalties' were conducive to the 'protection of morals' which made them 'necessary' in a 'democratic society'. Thus, it was in no way the Court's task to take the place of the domestic courts, but rather to review (under Article 10) the decisions they delivered in the exercise of their power of appreciation. The Court must decide whether the reasons given by the national authorities to justify the actual measures of 'interference' they take are relevant and sufficient under Article 10(2).

Having established the guidelines of its inquiry, the Court then considered the decision of the domestic court with regard to the publication. In this respect, it attached particular significance to the readership of the book, a factor that drew attention from the domestic court. The book was aimed at children and adolescents aged from 12 to 18. It was also direct, factual and reduced to essentials in style, making it easily within the comprehension of even the youngest of such readers. Although the book contained correct and useful factual information, it also included - particularly in the chapter on sex and in the passage 'Be yourself' in the chapter on pupils - sentences or paragraphs that young people at a critical stage of their development could have interpreted as an encouragement to indulge in precocious activities harmful to them or even to commit certain criminal offences. In these circumstances, despite the variety and constant evolution in the United Kingdom of views and ethics and education, the domestic judges were entitled, in the exercise of their discretion, to think at the relevant time that the publication would have pernicious effects on the morals of many of the children and adolescents who would read it.

Finally, the Court considered the measures in dispute. The applicant had argued that the failure to take legal action in other parts of the United Kingdom, that the book appeared and circulated freely in the majority of the member states of the Council of Europe, and that, even in Scotland and Wales, thousands of copies circulated without impediment despite the domestic court's ruling in 1971, showed that the judgment was not a response to a real necessity, even bearing in mind the national authorities' margin of appreciation. The Court, however, rejected those arguments. In particular, with regard to the practice of other states, it accepted that the contracting states had each fashioned their approach in the light of the situation obtaining in their respective territories, each having regard to the different views prevailing there about the demands of the protection of morals in a democratic society. The fact that most of them decided to allow the work to be distributed did not mean the contrary decision of the Quarter Sessions was in breach of Article 10. The Court also accepted that the failure to take proceedings in other parts of the United Kingdom did not call into question the necessity of the proceedings in England. The subsequent failure to prosecute the book was explainable on the grounds that by that time the book had been revised, in order to omit some of the more objectionable passages. Accordingly, the applicant's claims failed.

Controlling obscenity and indecency in domestic law

At the domestic level, some laws control indecent speech and acts, while others relate to acts or speech that are classified as obscene. For example, the Indecent Displays (Control) Act 1981 makes it an offence to display any *indecent* matter in a public place, while the Obscene Publications Act 1959 makes it an offence to publish *obscene* articles, in other words those that are capable of depraving and corrupting its readership.[8] In one case, therefore, it is enough that the material is shocking or offensive, or lewd and disgusting,[9] whereas in other cases the material must go further, and deprave and corrupt the morals of its likely readership, thereby attacking or threatening those morals in some way.

One argument in support of such laws is that the dissemination of such information is capable of causing harm to society's morals, the argument becoming stronger if the publication is likely to deprave and corrupt the thoughts and actions of the young, or the mentally or emotionally weak. That argument was, of course, very influential in the European Court's judgment in *Handyside*. An alternative is that restriction and regulation of such speech or acts protects society or individuals from shock or offence, or in certain cases, outrage.[10] Whether these laws are necessary and proportionate and in compliance with the European Convention depend on a number of related factors. These include whether there is a legitimate aim for its suppression or sanction; whether the offences are sufficiently clear to be 'prescribed by law'; the *mens rea* required for the offence; the nature and severity of the penalty and whether it imposes prior restraint; and whether there are any defences for 'legitimate' speech (particularly where such speech serves the public interest and the public's right to know).

In *Handyside*, the *Little Red Schoolbook* had been prosecuted under the Obscene Publications Act 1959, which at that time was at the heart of discussions regarding the control of free speech on grounds of public morality. The Act has been the source of many *causes célèbres*, most notably the prosecution of Penguin Books for the publication of *Lady Chatterley's Lover*, thus highlighting the danger of obscenity and indecency law to works of artistic or literary merit.[11] The Act is controversial in that the offending material will not merely be restricted and thus available at different locations or at a different time: an

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[8] Some provisions cover both definitions. For example, s.85 of the Postal Services Act 2000 (formerly s.11 of the Post Office Act 1953) makes it an offence to send an indecent *or* obscene article through the post.
[9] In *R* v *Anderson* [1972] 1 QB 304, the Court of Appeal held that the meaning of obscenity in s.11 of the Post Office Act 1953 (now s.85 of the Postal Services Act 2000) was to be construed in accordance with its natural meaning so as to include something which was lewd and revolting. This equated with the general meaning of the word 'indecency', which generally covers something that can be described as lewd, crude or disgusting.
[10] Thus, offences under the Indecent Displays (Control) Act 1981 and the variety of broadcasting controls operate on the basis that publication or broadcast of such material will upset public morality or the sensibilities of individual citizens or viewers.
[11] *R* v *Penguin Books* [1961] Crim LR 176.

action under the Act will stop publication, or future publication, completely, and the reader will be deprived of an opportunity to digest that information. However, the Act attempts to ensure that regulation is balanced against the need to allow valuable free speech, as s.4 provides a public good defence, allowing arguments to the effect that the publication of the material would enhance literary or other concerns.

Section 2 of the Act makes it an offence for a person to publish (whether for gain or not), or to have in their possession for publication for gain, an obscene article. Consequently, it is not an offence to read such material, or to have it in one's possession, provided one does not intend to publish the material. The Act thus concentrates on the publication of such information, attempting to prevent its dissemination. It is not necessary to prove an intention to deprave and corrupt and the intention or motive of the publisher or original author are not relevant in determining liability.[12] Further, the question is whether the *tendency* of the article is to deprave and corrupt the likely readership, not whether it has been proved to have had that effect. These features of the offence are further compounded by the fact that expert evidence is generally not available to discover the intention of the author, or its likely effect on the readership.[13] The Act does not define the words deprave and corrupt, but in *Penguin Books,* it was held that 'deprave' meant to make morally bad, to pervert or corrupt morally, and 'corrupt' meant 'to render morally unsound or rotten, to destroy the moral purity of, to pervert or ruin a good quality.' Further, in *Knuller* v *DPP,*[14] it was held that the Act applied to a publication that would produce a real social evil. The section thus concentrates on the likely effect on the reader, rather than its likely effect on public morals as a whole.[15]

It must be stressed that the Act does not employ a lesser test of indecency, and it is not sufficient that the publication would merely shock and disturb its readership. In *R* v *Anderson*,[16] the defendants were charged under s.2 of the Act for publishing and sending copies of the 'School kid's issue' of their magazine, *Oz*. The magazine contained items relating to lesbianism, homosexuality, oral sex and drug taking and the prosecution argued that it would deprave and corrupt its young readers. The trial judge directed the jury that the test in the Act covered that which was repulsive, loathsome and lewd, but on appeal, it was held that the sole test for obscenity under the Act was a tendency to deprave and corrupt. As the jury may have misunderstood the ambit of the statutory words, the conviction under the Act was quashed.[17]

There is also an implied 'defence' of aversion, and the defendant will escape liability if the likely effect of the publication is that it will cause revulsion in the reader. In *R* v *Calder and Boyars,*[18] the defendants had been convicted for publishing the controversial novel *Last Exit to Brooklyn*, which depicted the decadent lifestyle of a young man living in Brooklyn. On appeal, it was held that as the book contained many words and incidents rightly described as obscene in the ordinary sense of the word, it was important to explain to the jury the specific defence that their true effect in context was the reverse of tending to deprave and corrupt. This will allow the court to consider whether the true effect of the publication is to revolt the reader and, possibly, to reinforce their existing morality. Of course, this has

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[12] *R* v *Penguin Books* [1961] Crim LR 176.
[13] However, such evidence can be made available to explain particular concepts, such as drug taking, to an inexperienced jury, provided that does not attempt to explain the likely effect of the article on its intended readership. See *R* v *Skirving* [1985] QB 819, and *DPP* v *A and BC Chewing Gum Ltd* [1968] 1 QB 159: in this case the court held that the Act applied to the obscene depiction of violence.
[14] [1973] AC 435.
[15] Although *public* morality is highly relevant, because the question is whether those morals are likely to be distorted by the reader as a result of reading the material.
[16] [1972] 1 QB 302.
[17] The convictions under the 1959 Act were therefore quashed; although the court agreed that the meaning of obscene within s.11 of the Post Office Act was the ordinary meaning, which included shocking, lewd and indecent matter.
[18] [1969] 1 QB 151.

to be speculated on in most cases: is the reader going to look at a book about devious sexual practices and say 'that looks like a good idea' or are they going to be repelled by the idea?

The Act is not concerned solely with the corruption of sexual morals, but covers other matters such as the depiction of violence,[19] and drug taking. For example, in *John Calder Publications* v *Powell,*[20] *Cain's Book*, concerned the life of an imaginary junkie in New York and, in the court's view, highlighted the favourable effects of drug taking. The court noted that far from condemning such activities, it advocated them, and consequently there was a real risk that its readership might be tempted to experiment with drugs and to get the favourable sensations highlighted by the book. Further, in *DPP* v *Whyte,*[21] it was held that the Act was principally concerned with the effect of the material on the mind of the reader, including the emotions of the persons who read it, and that it was not necessary to show that the reader would manifest those depraved thoughts in any physical way.[22] Further, it was no defence that the likely readership was already corrupted,[23] the law believing that we are all capable of moral salvation.

In order to liberalise the law, s.4 of the Act provides a defence if it can be shown that the publication of the material can be justified in the public interest.[24] As s.4 is only considered after a finding of obscenity, the court will not allow the defence to be used in a way that revisits the question of whether the article was likely to deprave or corrupt. For example, in *DPP* v *Jordan*,[25] the House of Lords held that the phrase 'other objects of general concern' did not cover the alleged therapeutic value of the material.[26] Further, in *AG's Reference (No 3 of 1973)*,[27] it was held that the word 'learning' in s.4 could not be read so as to allow expert evidence to be available regarding the magazines in that they provided information to the readers about sexual matters. In the court's view, if learning was a noun, it must mean the product of scholarship, and cover something whose inherent excellence is gained by the product of the scholar. The defence could not be used, therefore, to argue that the article educated, or could have educated, the reader, and informed them of matters of which they were ignorant in the first place: 'well, I am glad I read that, now I know; you learn something every day!'

The Act and its wording and interpretation were, therefore, unscientific and often random. Today, prosecutions under the Obscene Publications Act are rare and it is more likely that action is taken under s. 63 of the Criminal Justice and Immigration Act 2008, which created the offence of possessing extreme pornographic images.[28] Section 63 (1) provides that it is an offence for a person to be in possession of

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[19] *DPP* v *A and BC Chewing Gum Ltd* [1968] 1 QB 159, Divisional Court.
[20] [1965] 1 QB 509.
[21] [1972] AC 849. Husband and wife booksellers had been charged under the Act with having in their possession for gain a number of pornographic magazines, including the intriguingly entitled *Dingle Dangle No 3*.
[22] This is also the case for prosecutions under the common law offence of corrupting public morals; *DPP* v *Shaw* [1962] AC 220.
[23] In this case, it had been argued that their readers were inadequate, dirty old men, who were addicts of this type of material and whose morals were already in a state of depravity. Rejecting the plea that such people were incapable of corruption, it was held that the Act was concerned not only with the protection of the wholly innocent, but also with the protection of the less innocent from further corruption, and the addict from feeding or increasing his corruption.
[24] Section 4 provides that: a person shall not be convicted of an offence under s.2 of the Act, and a forfeiture order under s.3 of the Act shall not be made, if it proved that the article in question is justified as being for the public good on the grounds that it is in the interests of science, literature, art or learning, or of other objects of general concern.
[25] [1977] AC 699.
[26] It had been argued that certain hard-core pornographic articles had some psychotherapeutic value for various categories of persons, providing a relief for their sexual tensions by way of sexual fantasy and masturbation and acting as a safety valve to save them from psychological and antisocial and possibly criminal activities directed at others.
[27] [1978] 3 All ER 1166.
[28] Under s.63(10) of the Act proceedings for an offence may not be instituted in England and Wales, except by or with the consent of the Director of Public Prosecutions. The maximum penalty on conviction on indictment is

an extreme pornographic image,[29] in other words one that is both pornographic and constitutes an extreme image.[30] An image is then defined as pornographic if it is of such a nature that it must *reasonably be assumed* to have been produced solely or principally for the purpose of sexual arousal.[31] An extreme image is then defined as an image which is grossly offensive, disgusting or otherwise of an obscene character,[32] and portrays, in an *explicit and realistic way*,[33] any of the following acts: one which threatens a person's life; which results, or is likely to result, in serious injury to a person's anus, breasts or genitals; one which involves sexual interference with a human corpse; or one of a person performing an act of intercourse or oral sex with an animal (whether dead or alive). This provision is, of course, subject to criticism,[34] but it is clearly based on avoiding identifiable and physical harm, rather than the often indefinable concept of public morality.

In addition to prosecutions under the Obscene Publications Act, public morality was, and is, protected from corruption and outrage at common law. The common law offence of conspiring to corrupt public morals, came to prominence in 1961 in the House of Lords' decision in *DPP* v *Shaw*.[35] In that case, the defendants had published the *Ladies' Directory*, a booklet containing the contact numbers, predilections and prices charged by female prostitutes. They were charged with conspiracy (with the prostitutes) to corrupt public morals and the House of Lords confirmed that such an offence did exist at common law and that it had been committed in this particular case.[36] The House of Lords held further that a specific intent was required to commit the offence, and that liability was based on the *corruption* of society's morals rather than causing mere shock and offence. However, unlike the 1959 Act, there is no public interest defence available to the defendant and the offence could be used to circumvent that safeguard in cases where the material has arguable public interest content.[37]

Further, in *Shaw* the House of Lords suggested that in addition to the offence of conspiracy to corrupt public morals, there existed at common law an offence of outraging public decency. This was confirmed by the House of Lords in *Knuller* v *DPP*,[38] where it was held that the offence existed at common law and could be brought both as a conspiracy charge and as a substantive offence. No specific *mens rea* is required for this offence and, again, the s.4 defence is not available. On the other hand, the House of Lords stressed that for the offence of outraging public decency to be committed, the contents must be so lewd, disgusting and offensive that the sense of decency of members of the public would be outraged by seeing or reading them, and that outrage went beyond shocking the public. Further, the prospect of

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three years imprisonment for possession of images portraying life-threatening acts or acts threatening serious injury, and two years for depictions of necrophilia and bestiality; 6 moths for all offences on summary conviction (s.67 Criminal Justice and Immigration Act 2008).

[29] An image is defined in s.63(8) of the Act as either a moving or still image (produced by any means), or data (stored by any means) which is capable of conversion into such an image.

[30] Section 63(2) Criminal Justice and Immigration Act 2008.

[31] Section 63(3).

[32] Section 63(6).

[33] This will exclude cartoons and drawings, which can quite often excite a strong response from the public or certain individuals.

[34] *See Susan Easton, 'Criminalising the possession of extreme pornography: sword or shield? (2011) 75(5), J. Crim. L., 391, and McGlynn and Rackley Criminalising Extreme Pornography: a lost opportunity [2009] Crim. LR 245.*

[35] [1962] AC 220.

[36] Similarly, in *Knuller* v *DPP* [1973] AC 435, the House of Lords upheld the convictions of the defendants when they had published a *Gentlemen's Directory*, consisting of a who's who of male homosexuals, and containing adverts such as 'alert young designer, 30, seeks warm, friendly, pretty boy under 23 who needs regular sex, reliability and beautiful surroundings. If the cap fits and you need a friend, write.' The House of Lords confirmed that there existed the offence of conspiracy to corrupt public morals, stating that to corrupt indicates that the conduct was destructive of the very fabric of society and meant more than being led morally astray.

[37] Such a defence was unlikely to have succeeded in *Shaw*, although it is extremely unlikely that the substance of the offence would be made out today.

[38] [1973] AC 435.

outrage must be related to the time and place of the exhibition – thus, public decency is to be distinguished from public morals.

Although it is highly questionable whether the defendants in the above cases would have succeeded under any public interest defence, the case of *R* v *Gibson and Sylverie*,[39] fuelled the debate concerning the prosecution of material outside the Obscene Publications Act. The case concerned the prosecution of an artist and a gallery owner in connection with the display of an exhibit at a gallery located in a shopping arcade. G had made a model's head and had attached to each of its ears an earring made out of a freeze-dried human foetus of 3–4 months' gestation. The model was displayed in a gallery, which was in a parade of shops, and following complaints, G and S, the gallery owners, were charged with conspiracy to corrupt public morals. The Court of Appeal confirmed that the charge of outraging public decency did not require an intention on behalf of the defendants to outrage, or an appreciation that there was a risk of such outrage coupled with a determination to run that risk, although the court felt that it made very little difference in this case. A subsequent appeal under the European Convention was dismissed as inadmissible.[40]

Morality, free speech and the European Court of Human Rights

In relation to the case law of the European Convention on Human Rights, the European Court has held that Article 10 of the Convention is wide enough to cover morally offensive speech. Thus, in *Handyside* it held that broadmindedness, tolerance and pluralism are hallmarks of a democratic society, and that accordingly Article 10 covers speech that shocks and offends. However, as we have already seen, in that case the Court made it clear that such speech is more susceptible to interference than, for example, political expression, and that the domestic authorities would be given a wide margin of appreciation in regulating speech that causes harm to the morals of a particular state or the interests of particular individuals.[41]

Thus, not only has the Court accepted that the protection of public morality and the sensibilities of others are legitimate aims for the purpose of Article 10(2), it has also made it clear that each member state has a wide discretion in deciding what laws to adopt and how to apply them.[42] This approach was evident in *Handyside,* and is also seen in *Müller* v *Switzerland*.[43] In this case, several paintings portraying various unnatural sexual acts, crudely depicted in large format, had been displayed in an art exhibition and were seized by the authorities. The applicants, the artists and promoters, were subsequently prosecuted and fined for displaying obscene materials and the paintings were held to be examined only by specialists. The paintings were returned to the owners eight years later. The applicants claimed that this amounted to an unjustified interference with their Article 10 rights. The European Court held that offensive and indecent material could be regulated by domestic law, provided it caused more than mere shock to the public. In the present case, it was not unreasonable for the domestic courts to find that the paintings were likely to 'grossly offend the sense of sexual propriety of persons of ordinary sensibility'. The proceedings therefore fell within the state's margin of appreciation as being necessary in a democratic society and accordingly there had been no violation of Article 10.

The Court and Commission thus have also given little protection to hard-core pornography, particularly where it is likely to be viewed by unwitting or vulnerable individuals;[44] although a greater tolerance has been shown in cases where the adult audience willingly encounters such material.[45] A 'hands-off'

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[39] [1991] 1 All ER 441.
[40] *S and G* v *United Kingdom* (Application No 17634), considered below
[41] For a broad coverage of the Court's jurisprudence in this area see The European Court of Human Rights Council (Research Division), 'Cultural Rights in the case law of the European Court of Human Rights' available at https://www.echr.coe.int/documents/research_report_cultural_rights_eng.pdf
[42] See Fenwick and Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006), pages 410–422.
[43] (1988) 13 EHRR 212.
[44] *Hoare* v *United Kingdom* [1997] EHRLR 678.
[45] *Scherer* v *Switzerland* (1994) 18 EHRR 276.

approach was also evident in the admissibility decision in *Marlow* v *United Kingdom*,[46] where the applicant had published a book about the cultivation and production of cannabis. He was convicted for incitement to commit an offence under the Misuse of Drugs Act 1971, and claimed that the book was a genuine contribution to the debate about the legalisation of cannabis and that he had made it clear that the growing of cannabis was unlawful. In rejecting his application as manifestly ill-founded, the European Court held that the prosecution and conviction pursued a legitimate aim and that in the circumstances it was a necessary and proportionate act.

This approach has also been adopted with respect to artistic expression.[47] Thus, in *S and G* v *United Kingdom,*[48] the European Commission of Human Rights restated the principles in *Handyside,* and held that the law of outraging public decency was sufficiently clear, had a legitimate aim and was not disproportionate, even though there was no defence based on artistic merit. In the Commission's view, the defendants could have argued that the exhibition was not an outrage to public decency and thus have raised the issue of freedom of expression. In conclusion, the prosecution was within the state's margin of appreciation, taken for the legitimate aim of the protection of morals.

However, the Court has displayed less tolerance to the interference of indecent speech when such expression serves a political purpose and constitutes political satire. Thus, in *Kunstler* v *Austria,*[49] it was held that there had been a violation of Article 10 when the applicants' painting – depicting several outrageous sexual acts being performed by political and religious figures – was the subject of an injunction and an action for damages brought by a politician who claimed to have been debased by the painting. The European Court held that although states were given a wide margin of appreciation with respect to obscene and blasphemous material, in this case the painting had depicted political satire and that the law and the victims should be more tolerant of such depictions.[50] It should be noted, however, that the reasons for interference were not based on public morals, but on the desire to protect individuals from attacks on their reputation and honour. The decision should not, therefore, be taken as questioning the stance adopted by the Court in cases such as *Muller*, and there is evidence that it is prepared to control such speech where it causes outrage or an affront to a country's heritage.[51]

Conclusions

Handyside was decided 45 years ago and the original trial was 50 years ago, and whilst the original prosecution is showing its age (as is much of the case law under the 1959 Act and related offences), the European Court's approach has been maintained. Thus, as long as domestic law attempted to safeguard the public from gross offence, and public morality from corruption, the European Court tended to

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[46] (Application No 42015/98), decision of the European Court 5 December 2000.
[47] See Andra Matei, 'Art on Trial. Freedom of Artistic Expression and the European Court of Human Rights' (May 29, 2018). Available at
SSRN: https://ssrn.com/abstract=3186599 or http://dx.doi.org/10.2139/ssrn.3186599
[48] (Application No 17634). The domestic proceedings have been dealt with above.
[49] (Application No 68354/01), decision of the European Court 25 January 2007.
[50] See also *Tatar v Hungary* (Application nos. 26005/08 and 26160/08), decision of the Court 12 June 2012. Here the applicants were fined for illegal assembly after staging a performance which involved exposing items of dirty clothing on a fence surrounding the Parliament building in Budapest. The applicants stated that the event was a political performance symbolising "hanging out the nation's dirty laundry". The Court found a violation of Article 10, ruling that the applicant's performance amounted to a form of "political expression" and that the authorities had not given "relevant and sufficient" reasons for the interference.
[51] *Ehrmann and SCI VHI v France* (Application 2777/10), decision of the European Court 1 October 2001. In this case, the applicants (a visual artist and a real estate company) were subjected to criminal and civil penalties for breaching planning regulations on account of the art works that were placed on the outer walls and boundary wall of a well-known contemporary art venue located within sight of a church and a manor house, both of which landmark buildings. The Court dismissed the applicants' complaint and underlined that in the present case the disputed interference intended to ensure the quality of the environment surrounding protected national heritage structures and that "this was a legitimate aim for the purposes of protecting a country's cultural heritage".

support the domestic authorities rather than seek to disturb that morality and promote a more liberal attitude to offensive speech and expression. What has changed, of course, is the social mores of each state, the public becoming more tolerant of sexual speech and acts; or at least conceding that the old standards cannot survive. The full force of obscenity and indecency law has also been replaced by the softer touch of broadcasting regulation, which ensures that public morality is safeguarded via standards of decency and taste and especially through broadcasting watersheds.

The *Handyside* litigation provides a useful insight into the mores of 50 years ago, and both statute and the common law provided support for the fight against sexual and other expression that threatened those standards. It is hard to imagine that figures such as Mary Whitehouse, who campaigned a clean-up campaign during the 1960's and 70's, had such a profound impact in the regulation of free speech. Today the law faces new challenges: hate speech; speech that threatens the enjoyment of religious or privacy rights; and as a result a new public and private morality has emerged, which the law must protect and balance against the democratic right of free speech. The idea of protecting public morality from corruption and outrage now seems antiquated, but those laws provided us with a fascinating battle between on the one hand free speech and emerging values, and on the other, the protection of the old guard and its own values. Handyside was perhaps the most famous of those cases, and it is apt to mark its fiftieth anniversary.

Application of the Rules of Natural Justice in Arbitral Proceedings in Nigeria

Abdulrazaq Adelodun Daibu*

Introduction

The basis for arbitration as an alternative dispute resolution mechanism is dependent on the parties' preference for a simple, faster and more informal way to resolve their dispute without any publicity, technicalities and rigidity associated with litigation.[1] Arbitration, like other dispute resolution mechanisms is regulated by law; hence the task of arbitrator(s) as umpire is to ensure that justice is done in any reference without infringing the civil rights of parties thereto.[2] Apart from the ethical obligation of arbitrator(s) to use skill, diligence and care in the performance of his duties, the rules of natural justice also imposes a legal duty on arbitrator to ensure that parties to the arbitral proceedings are accorded a fair hearing and equal treatment in line with the rules of natural justice.[3] The rules of natural justice ensure procedural fairness, which ensures parties in judicial or quasi-judicial proceedings have equal opportunities of presenting their cases and dealing with the claims of the other party. The rules are basically twofold: *audi alteram partem* (hear the other side) and *nemo judex in causa sua* (no one shall be a judge in his own case), and are to a greater extent applicable to both statutory and customary arbitration. This article analyses the evolution and significance of arbitration as a dispute resolution mechanism, and the rationale for the application of the rules of natural justice in judicial and quasi-judicial proceedings. This article further considers the application and operation of the rules of natural justice in both statutory and customary arbitral proceedings in Nigeria and concludes by making suggestions and recommendations for its efficient application to ensure procedural fairness in arbitral hearings.

The historical evolution and significance of arbitration

Arbitration is a dispute resolution mechanism that involves amicable resolution of disputes between parties with a binding decision in a judicial manner by person(s) other than a court.[4] The practice of arbitration as a method of resolving disputes has been with mankind in one form or the other from time immemorial, and has grown to be one of the most potent and efficient alternative dispute resolution mechanism in many legal system in recent time; largely because it ensures confidentiality between or among the parties, it saves time, is less cumbersome, is economical and more friendly.[5] It is difficult for any society to lay claim to the evolution of the practice of arbitration. Although countries like China, India, Italy, Nigeria and a host of others claim to be the first countries to introduce the system,[6] evidence of settlement of private, commercial and international disputes through arbitration found in the

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[1] Abdulrazaq Adelodun Daibu and Ibrahim Kayode Adam, 'Competence-Competence and Separability under the Nigerian Arbitral Law: a Curse or Blessing?' (2017) Yonsei Law Journal 8 (1 & 2) 31; Muhammed Mustapha Akanbi, 'Contending without being Contentious: Arbitrators, Arbitration and Arbitrability' (University of Ilorin Press, Ilorin, 2014) 3.

[2] Rom Chung, "The Rules of Natural Justice in Arbitration" (2011) 77(2) Arbitration 167.

[3] See s.36(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), herein after referred to as the Nigerian Constitution, and s.14 Arbitration and Conciliation Act LFN 2004, herein after referred to as ACA.

[4] Akanbi, nn. 1, 3.

[5] Abdulrazaq Adelodun Daibu, "The Lagos State Arbitration Law and the Doctrine of Covering the Field: A Review" (2014) *University of Maiduguri Law Journal* 11, 35.

[6] Muhammed Mustapha Akanbi, *Domestic Commercial Arbitration in Nigeria: Problems and Challenges* (Lambert Academic Publishing, Germany, 2012) 56.

Sumerian inscriptions dating back to 400 BC has debunked the claims.[7] Arbitration has always been an informal and effective method of resolving disputes by which businesspersons would call in a third party to hear the parties to a dispute and give a binding decision in the form of an award.[8] The third party - arbitrator - is usually someone familiar with the parties' trade or business from which the dispute arose or someone with a good knowledge of the domestic rules and nuances of their trade and business practice.[9]

In Nigeria, in the early period arbitrators are usually non-lawyers, but are businesspersons and professionals with a keen understanding and practice of commercial transactions.[10] Arbitrators were usually chosen from business associations and/or professional bodies such as those knowledgeable in insurance, maritime and construction sectors, because the arbitration clauses in most contracts involving these professional groups and business association often provided for the appointment of arbitrators by the respective presidents of these bodies.[11] As a result, these, arbitrators were usually professionals in diverse areas of businesses and relevant fields, e.g. quantity surveyors, architects, insurance professionals, maritime experts and engineers.[12] However in recent years, serving and retired judges, and practicing lawyers are also being appointed as arbitrators, a development scholars have argued is leading to gradual legalisation of the arbitral process.[13] The commercial and contractual origin of arbitration account for the fact that despite advances in knowledge, sophistication and complexities in business relationships parties still prefer arbitration because of its consensual nature as well as confidentiality and flexibility of its proceedings.[14]

Arbitration has been in Nigeria and other parts of Africa long before the advent of the colonialist.[15] In Nigeria for example, various communities have their peculiar systems of disputes resolution known as customary arbitration.[16] Customary arbitration is a traditional system where community heads, traditional chiefs, family heads, and elders are actively involved in dispute resolution to ensure social justice and harmony within and among the various communities.[17] Customary arbitration is still recognised as part of Nigerian jurisprudence practiced among the Igbo, Yoruba and Hausa communities in the south-east, south-west and northern part of the country respectively.[18] The existence and validity of customary arbitration was affirmed by the Nigerian Supreme Court in the case of *Agu v. Ikweibe*[19] thus:

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[7] Ibid 56-57.
[8] Andrew Chukwuemerie, 'A Synergy of Opposite: Effective Commercial Justice, Rights and Liberties in African Jurisprudence' in Andrew Chukwemerie (ed.) Growing The law, Nurturing Justice (Law House Books, Port Harcourt, 2005) 193.
[9] Ibid.
[10] Ibid.
[11] Muhammed Mustapha Akanbi, 'Challenges of Arbitration Practices under the Nigerian Arbitration and Conciliation Act of 1988: Some Practical Considerations' (2012) 78(4) Arbitration 329.
[12] Ibid.
[13] Ibid.
[14] Abdulrazaq Adelodun Daibu Ibrahim Kayode Adam 'Alternative Dispute Resolution and the Dwindling Fortunes of Arbitration in Nigeria: Is Fast Track Arbitration the Solution? (2019) 3 (2) Obafemi Awolowo University Law Journal 466; Sunday Fagbemi, 'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?' (2015) 6(1) Journal of Sustainable Development Law and Policy 224.
[15] Virtus Chitoo Igbokwe, 'Law and Practice of Customary Arbitration in Nigeria: Agu V. Ikewibe and Applicable Law issues Revisited" (1997) *Journal of African Law* 41(2) 200.
[16] Muhammed Mustapha Akanbi, Lukman Adebisi Abdulrauf and Abdulrazaq Adelodun Daibu. 'Customary Arbitration in Nigeria: A Review of the Extant Judicial Parameters and the Need for Paradigm Shift' (2015) 6 (1) *Journal of Sustainable Development Law and Policy* 205,207.
[17] Abdulmumin Adebayo Oba, 'Juju Oath in Customary Arbitration and Their Legal Validity in Nigerian Courts' (2008) 52 (1) Journal of African Law 140.
[18] These are the three dominant ethnic groups in Nigeria. See Abdulmumin Adebayo Oba, "Religious Rights and the Corporate World in Nigeria- Products and Personnel Perspective" (2004) Recht in Afrika, 196.
[19] (1991) 3 NWLR (Pt. 180) 385.

> It is well accepted that one of the many African customary modes of settling dispute is to refer the dispute to the family head or an elder or elders of the community for a compromise solution based upon the subsequent acceptance by both parties of the suggested award, which either party is free to resile at any stage of the proceedings up to that point. This is a common method of settling disputes in all indigenous Nigerian societies. [20]

The above decision does not only shows that customary arbitration is recognized under the Nigerian legal system, but also emphasizes the final and binding nature of its award. Apart from these judicial pronouncements, customary arbitration also have statutory and constitutional basis under the Nigerian law. For example, s.35 (b) ACA recognizes the fact that certain disputes may be submitted in accordance with such other laws which scholars have argued to include arbitration and in accordance with customary law otherwise known as customary arbitration.[21] Similarly, s.315(3) and 4(b) of the Nigerian Constitution also recognizes the continued operation of some existing laws before the enactment of the Constitution. Hence, there are arguments that customary law, upon which customary arbitration is based, is part of existing laws.[22] The advent of the statutory/commercial arbitration came with the colonization of Nigeria.[23] Arbitration has developed with time and still a progressive field because parties to dispute are always desirous of settling their disputes with less formality and expense than is involved in recourse to the courts. [24]

An appraisal of the rules of natural justice

The rule of natural justice is of primordial origin and also has scriptural history.[25] The Bible in the book of Genesis[26] narrated how God created Adam and Eve and put them in the Garden of Eden with instructions on what to do and what not to do, particularly an injunction to them not to eat the forbidden fruit. In spite of God's injunction, Eve having been tricked by Satan ate the forbidden fruit and thereafter, convinced her husband Adam to take same. Despite the fact that God saw them and knew what they did, He still gave them a fair hearing by asking them why they were hiding and what they have done. He allowed both of them to state their own side before passing judgment on them.[27]

Similarly, the biblical story of Cain is also relevant.[28] God asked Cain, after Cain had killed his brother, "where is Abel thy brother?" Cain's retort was rather direct, "I don't know: am I my brother's keeper"? Clearly, the opportunity of hearing Cain had been availed him prior to "sentencing". The above scriptural references demonstrate the early application of the principle of natural justice and that the creator of human kind also values fair hearing (which is a basic pillar of natural justice) as God himself did not pass sentence upon Adam and Eve before they were called upon to make their defence.[29]

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[20] See also the cases of *Odonigi* v. *Oyeleke* (2001) 6 NWLR (Pt. 708) 12; *Ohiaeri v. Akabeze* (1992) NWLR (Pt. 221) 1, at 7.
[21] Igbokwe, n. 15, 205-206; Akanbi, n. 6, 143.
[22]Abdulrazaq Adelodun Daibu and Lukman Adebisi Abdulrauf 'Challenges of the Practice of Customary Arbitration in Nigeria' (2014) *The Nigerian Juridical Review,* 12,104; Igbokwe, note 15, 206.
[23] Nigeria was a British colony until 1960 when it got its independence. For a detailed history of the Nigerian historical link with common law. See John Asein, *Introduction to Nigeria legal System* (2nd Edition, Ababa Press Ltd. Lagos 2005) 98; Akintunde Olusegun Obilade, *The Nigerian Legal System* (Spectrum Books Ltd, Ibadan 1979) 17.
[24] Paul Obo Idornigie, "Overview of A D R in Nigeria" (2007) 73(1) Arbitration 73.
[25] See Generally Lukman Ayinla 'Fair Hearing: Is it a Magic Wand to Cure all Ills in all Mellius?' (2006) 2University of Ilorin Law Journal*,* 49*;* Muhtar Etudaiye 'The Doctrine of Natural Justice as an arm of the rule of law' (2006) 2(1) Ilorin Bar Journal 103.
[26] See Genesis chapters 1 and 2.
[27] The Supreme Court of Nigeria made reference to this scenario in the case of *LDPC v Gani Fawehimi* (1985) 2 NWLR (Pt.7) 300, 347.
[28] Genesis 4:8-12.
[29] Abdulrazaq Adelodun Daibu, 'The Significance of Rules of Natural Justice in Administration of Justice" (2015) 1(1) *Al-Hikmah University Law Journal* 193.

The rules of natural justice (which connotes "fair hearing" or "fair trial") emerged on the basis that parties must have equal and reasonable opportunity to have a fair trial before any decision is reached.[30] The rules have over the time become an international standard for determining the validity or otherwise of judicial and non-judicial or quasi-judicial proceedings in modern time.[31] The rules were developed to ensure that decision-making by a judicial or quasi-judicial body is fair and reasonable. It concerns procedural fairness that ensures a fair decision is reached by an objective and impartial decision maker.[32] It is submitted that an arbitral tribunal being a quasi-judicial body is expected to observe the rules of natural justice by affording the parties equal and reasonable opportunity of presenting their case and dealing with that of the other party. Natural justice involves the decision-maker informing parties of the case against them or their interests, giving them a right to be heard, not having a personal interest in the outcome and acting only on the basis of logically probative evidence.[33]

The rules of natural justice have been domesticated in several laws, enshrined in many constitutions, international conventions and arbitral institutional rules.[34] Therefore, an arbitral tribunal been a quasi-judicial body is expected to apply the rules of natural justice in its proceedings by protecting the fundamental right to fair hearing of parties and accord them equal treatment in order to have a legally binding and enforceable award. The rules encompass two fundamental pillars viz:

i. *nemo judex in casa sua* (no man can be a judge in his own case); and
ii. *audi alteram partem* (hear the other side)

The first fundamental rule of natural justice states that no person can be a judge in a case in which he or she is a party. This has been extended to mean that he or she should have no personal interest in the outcome of the case and should not be biased.[35] The second principle prohibits a judicial decision which affects the civil or individual rights of parties in a dispute without been heard.[36] Habeas corpus was an early expression of the principle and in recent years, it has extended to include a right to receive notice of a hearing and a right to be represented.[37]

The rules of natural justice are embodied in the United Nations Universal Declaration on Human Rights,[38] the Europe Convention on Human Rights,[39] the American Convention on Human Rights,[40] as well as the African Charter on Human and People's Right.[41] Although the notion of natural justice does

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[30] Ibid; David Altaras, 'Arbitration in England and Wales and the European Convention on Human Rights: Should Arbitrators be frightened?' (2007) 73 (3) Arbitration 264.
[31] Chung, n. 2, 167.
[32] Principle of Natural Justice http://www.cricketeurope2.net/docs/ECC/TSOP2010/ANNEXURES/C110.pdf 203 accessed 19 April 2020; Natural Justice/Procedural Fairness http://www.ombo.nsw.gov.au accessed 21June, 2020.
[33] Natural Justice/procedural fairness in http://www.ombo.nsw.gov.au accessed 14th December, 2020.
[34] See generally Article 10 of the Universal Declaration of Human Rights; Article 6 European Convention on Human Rights; Section 36(1) of the Nigerian Constitution; Article 7 of the African charter on Human and peoples' (Ratification Enforcement) Act cap. A9 Laws of Federation of Nigeria (2004); Article 9 United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL); Article 7 American Arbitration Association International Arbitration Rules (AAA); Article 22 World Intellectual Property Organisation Arbitration Rules (WIPO); Article 12 Arbitration Rules of the Regional Centre for International Commercial Arbitration Lagos (RCICA).
[35] Chung, n. 2, 167.
[36] Thomas Klotzel, 'The Right to be Heard and Right to Hear: Cultural Dimensions of International Commercial Arbitration' (2006) 72(1) Arbitration 27.
[37] Fabian Ajogwu, *Commercial Arbitration in Nigeria: Law and Practice* (Mbeyi & Associates Nig. Ltd. Lagos 2009) 120.
[38] Article 10 United Nations Universal Declaration of Human Rights.
[39] Article 6 (1) European Convention on Human Rights. The UK Human Rights Act 1998 gives effect to this Convention.
[40] Article 8 American Convention on Human Rights.
[41] Article 7 (1) (d) of the African Charter.

not require any statutory basis, because it is an in alienable right, practically all countries of the world provides for fair hearing in judicial and quasi-judicial proceedings.[42]

Application of the rules of natural justice in statutory and commercial arbitration in Nigeria

The rules of natural justice are provided in the Nigerian Constitution and applicable to any judicial or quasi-judicial proceedings. The Constitution states that in the determination of the civil rights and obligations of a person in any question or determination by or against any government or authority, a person shall be entitled to fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.[43] The obligation to act fairly binds all persons performing judicial and quasi-judicial functions. Therefore, an arbitral tribunal being a quasi-judicial body, must be fair, unbiased and impartial in its proceedings. Parties must be given a fair hearing and a full or equal opportunity to present their respective cases.[44] Fair hearing is a fundamental issue in arbitral proceedings and this can only be achieved by giving the parties a reasonable opportunity to present their cases in person with such legal advisers and witnesses as the parties may wish to bring with them in the course of arbitration.[45] In arbitration the arbitrators assumes the role of a judge or umpire and must therefore ensure that parties are accorded their constitutional right of fair hearing in accordance with the rules of natural justice. As an unbiased arbiter an arbitrator is expected to give a fair hearing to both parties and give an award based on evidence presented by the parties at the trial.[46] Section 14 ACA encapsulates the *audi alteram partem* rule, which is fundamental to all adjudicatory process and a basic pillar of natural justice. The section provides that:

> In any arbitral proceedings, the arbitral tribunal shall ensure that the parties are accorded equal treatment and that each party is given full opportunity of presenting his case.

Similarly, Article 15(1) of the UNCITRAL Arbitration Rules also applicable to arbitration under the Arbitration and Conciliation Act[47] provides thus:

> Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner, as it considers appropriate, *provided that the parties are treated with equality and that at any stage of the proceedings, each party is given a full opportunity of presenting his case*. (italics for emphasis)

The above provisions clearly shows that the rules of natural justice and fair hearing are fundamental to arbitration like any other adjudicatory process, therefore, in achieving the objectives of the rules of natural justice, the tribunal may apply and observe the following general principles critical to granting the parties a fair hearing:

a. Each party must be aware of his opponent's case and must be given reasonable opportunity to test and rebut the same.
b. Each party must have a full opportunity to present his own case to the tribunal.

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[42] See for example Section 19 (3) of the Ghana Constitution 1992, section 36 of the Nigerian Constitution and section 34 of the South African Constitution.
[43] Section 36 (1) of the Nigerian Constitution.
[44] Daniel Brawn, 'Commercial Arbitration in Dubai' (2014) Arbitration 80 (2) 161.
[45] Ajogwu, n. 37, 123.
[46] Ibid.
[47] Section 53 ACA provides for the application of Arbitration Rules set out in the First Schedule to the ACA. It provides that: "Notwithstanding the provisions of this Act, the parties to an international commercial an agreement may agree in writing that disputes in relation to the agreement shall be referred to arbitration in accordance with the rules set out in the first schedule to this Act, or the UNCITRAL Arbitration Rules or any other international arbitration rules acceptable to the parties (emphasis mine).

c. The parties must be treated alike: equality of parties to put forward their respective case and to test that of their opponent.[48]

An arbitrator must be neutral and act fairly and impartial to both parties, He must also not receive a bribe or benefit one way or the other from his or her decision.[49] An arbitrator should not be seen to favour one party at the expense of the other as justice must not only be done, but be seen to be done in arbitral process.[50] The implication of violation of the rules of fair hearing in arbitration is that the award will not be enforceable and liable to be set aside by the courts on appeal.[51] A tribunal does not have to follow the strict procedures of a court of law in so far the procedure adopted is not repugnant to natural justice, inconsistent with the practice of a particular trade or business the parties, and does not lead to any unfairness between the parties in the dispute.[52] In *Phipps v Ingram,*[53] the dispute involved the recovery of the price of a wheeled carriage that had been built under a written contract. The arbitrator viewed the carriage and took evidence from the defendant's witnesses, but refused to examine the witnesses produced by the plaintiffs because it was considered unnecessary. The award made in favour of the defendant was subsequently set aside.[54]

The duty to accord equal treatment to the parties includes, among other things, that the tribunal must not hear one party or his witness in the absence of the other party or his representatives. Where evidence is received behind a party, and he objects to it, the fact that he continues to attend the proceedings will not amount to waiver if the irregularity in receiving evidence behind him amounts to a denial of natural justice.[55] In the case of *Umar v Onwudiwe,*[56] it was held that the arbitrator has a legal obligation and duty to conduct the arbitral proceedings fairly, and this includes among other things to hear the parties by giving them equal treatment, and considering all materials issues submitted before delivering its award.

It must be noted however that there are a few exceptions,[57] apart from which both parties must be heard in the presence of the other. A party that chooses not to utilize the opportunity accorded him to present his case and contradict or test his opponent case without any cogent reasons, cannot afterwards complain that his right to fair hearing has been is denied or breached.[58] It is pertinent to note that the right to attend the hearing need not be exercised in person: it may in certain circumstances be exercised through agent, counsel, or any other person acting as advocate, representative or such other professional as may be suitable for that purpose.[59]

The rules of natural justice in customary arbitration

A typical customary arbitral process in most Nigeria societies starts with a complaint by an aggrieved party to the appropriate judicial authority under the custom of the parties after which the other party is

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[48]Ajogwu, n. 37, 119.
[49] Chung, n. 2, 175.
[50] See *Flatamontos Maritimos SA v EFF John International* (1997) 63 2(5) JCI Arb.)18, 20.
[51] Patrick Tailor, 'Adjudicators' Fees Where the Decision Is Unenforceable (2013) 79 (1) Arbitration 105.
[52] Ephraim Akpata, 'The Nigerian Arbitration' Law in Focus, 47; Olakunle Orojo and Ayodele Ajomo, Law and Practice of Arbitration and Conciliation in Nigeria (Lagos: Mbeyi and Associates Nig. Ltd, 1999)171.
[53] (1853) 3 DOWL 669
[54] Note however, that if the arbitrator refuses to accept the evidence of either parties and they raise no protest at the proceedings, they will be deemed to have waived their rights: *Riddle v Sutton* (1828) 6 Bing 200. See also s.33(a) and (b) ACA.
[55] Akpata, n. 52, 47.
[56] (2002)10 NWLR (Pt. 744) 150
[57] For instance if any of the parties fail to appear at the hearing or produce documentary evidence, the arbitral tribunal may continue the proceedings and make an award. See section 21(b) and (c) ACA.
[58] *Bill Construction Co. Ltd. v Imani & Sons* Ltd (2006) 19 NWLR (Pt. 1013) 1, 14; *Stabilini Visiononi Ltd. v. Mallinsion & Partners Ltd.* (2014) 12 NWLR (Pt. 1420) 134, 205.
[59] Gaus Ezejiofor, *The Law of Arbitration in Nigeria* (Longman Nig Plc 1997) 75.

summoned or invited.[60] Upon a complaint of an aggrieved party, the elders would have a gist of the case before them before inviting the other party, and thus the question arises whether they are not biased already. It seems that this is not so, as the tribunal are usually respected elders of impeccable character and unblemished integrity that have the sacred responsibility of listening to the other party before a decision can be reached. Hence, as an independent umpire, they will invite and listen to the other party before any decision in the form of an award can be made.

It has been argued that the early African societies like other incipient societies around the world did not have the equivalent of Bill of Rights.[61] Indeed such things evolved with time in each society even in developed societies like the United Kingdom and the United States, that are advanced in protection of human rights and observance of the rules of natural justice.[62] The diversity in culture and traditional practices of the various Nigerian communities makes it difficult to generalize human rights in which the right to fair hearing is a basic component in the very early periods. However, the observance of human rights and natural justice did not attract as much importance and care as it now commands.[63] The observance of the rules of natural justice generally depend on the social status of the person in question: a slave for instance, in pre-colonial period was for all intents and purposes a subject of ownership of his master and therefore not entitled to some of the rights guaranteed by law.[64] He had a right to life quite generally as against third parties, not strictly or fully against his owner or the empire /kingdom.[65] He certainly had no enforceable right to a fair hearing or equality with a free born (a non-slave) before the law. If he is ever allowed to have a matter adjudicated between him and a freeborn he could not demand any fair hearing or equal treatment from the adjudicated body, whether it was a court or an arbitral tribunal.[66] In fact, it will be a privilege for a slave to appear before any such body in a contest with a freeborn. A slave is not entitled to appoint any arbitrator.[67] The normal thing was that he would only be able to complain in any matter to any person outside the owner's house and state his case in any dispute with an outsider through his owner. Any complaint or case against him would also be made to or against his owner. His owner would therefore pursue a claim or defend him (the slave) in the owner's own name in any arbitral or court proceeding between the slave and a freeborn.[68] The slave owner in such proceedings occupied a higher estate than a next friend would do today in proceedings involving an infant.[69]

In some communities in the southwest Nigeria, the king was conceived as capable of doing no wrong. A citizen no matter his social status could not maintain a civil claim of any kind against the king. The question of an arbitral proceeding between a citizen and the king, whether or not a tribunal sitting over same, had to observe the rules of natural justice and a fair hearing could not therefore arise. As between other free-born however there was equality of rights with little exceptions.[70]

Generally, amongst free-born outside the monarchy there was equality of persons before the law. Arbitral tribunals therefore simply owed the parties the duty of equal treatment and a fair hearing.[71] The rules of natural justice have been in existence among the free-born in African communities from time immemorial, and the indigenous communities in pre-colonial era believed in the spirit of fair hearing.

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[60] Akintude Emiola, *The Principles of African Customary Law* (2nd edition, Emiola publishers Ltd Nigeria, Ogbomoso, 2005) 37, 38.
[61] Chukwuemerie, n. 8, 213
[62] *Ibid*.
[63]Andrew Chukwuemeire, 'Arbitration and Human Rights in Africa' 110.
[64] Ibid.
[65] Ibid.
[66] Chukuemerie, n. 8, 214.
[67] *Ibid*.
[68] Chukwuemeire, n. 63, 110.
[69] *Ibid*.
[70] For instance, in Yoruba land in Western part if Nigeria and Benin Republic, the *Aare Ona Kankafo*, the overall warlord of the race seem to have a social status above those of the other free born, and have some rights above those of other people but far less than the 'Oba' (King). See Chukwuemeire, n. 63, 110-111.
[71] Ibid.

[72] The Yoruba people of western Nigeria would say: *"Agbo ejotenikanda agbaosikani"* (He is wicked who ever pass judgment on the basis of one-sided evidence).[73] The Effik of the southern Nigeria will say *"moguniidikutisu ye edem"* (I wish to see face [or front] and back i.e. to hear both sides of dispute).[74]

One can therefore safely conclude that the rules of natural justice are applicable under customary arbitration.[75] Thus, the foregoing expressed the acknowledgment of the rules of natural justice in African communities. It is submitted that where an arbitral tribunal or single arbitrator rendered an award out of a proceeding in breach of the sacred principles of equal treatment of the parties and fair hearing in any material way, the dissatisfied party could complain to that very tribunal or arbitrator (or any other higher tribunal recognised by the custom of that particular communities) and such an award is liable to be set aside. From the foregoing, it is clear that the observation of the rules of natural justice is a *sine qua non* to the exercise of any judicial or quasi-judicial power, even under customary law.

The application of the rules of natural justice in arbitration: approaches in various jurisdictions

The right of a party to be given a full and reasonable opportunity to present his case is a basic element of the constitutional right to fair hearing.[76] In the UK, the European Convention on Human Right (ECHR) has been incorporated into the English law with the enactment of Human Rights Act 1998 (HRA), which is applicable to arbitral proceedings in England.[77] Section 3(1) of the Act is to the effect that primary legislation which includes the Arbitration Act 1996, other subordinate legislations (which include rules made pursuant thereto), must be read and given effect in a way in which is compatible with convention rights.[78] Courts and tribunals will thus have regard to the ECHR in considering any application or appeal concerning arbitration because arbitral proceedings affect the civil rights and obligations of the parties involved.[79] Article 6(1) of the ECHR provides that:

> In the determination of his civil rights and obligations… everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…[80]

It is submitted that "Public hearing" as contained in the above provision is in respect of courts and formal tribunals. Public hearing of such judicial or quasi-judicial proceedings is mandatory although there are certain exceptions.[81]

As regard arbitration, however, it is contended that parties thereto have by implication waived their right to public hearing by their voluntary submission to arbitrator(s) in order to settle their dispute by private judges recognised by the state.[82] Arbitration is a private arrangement of parties with much

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[72] Ibid.
[73] See Ayinla, n. 25, 52; Oseni U.A. 'The inextricability of law and morality; An Appraisal of the Nigerian Legal System' 126.
[74] Ibid.
[75] Ayinla, n. 25, 52-53.
[76] Klotzel, n. 36, 29.
[77] Sutton D.S. et al, Russel on Arbitration 23rd ed. (Sweet and Maxwell London 2007) 17; Altaras, note 30, 262.
[78] Section 3 HRA.
[79] Altaras, n. 30, 264.
[80] See also Article 103(1) of the German Constitution and Article 14 of the International Convention on Civil and Political Rights Adopted and opened for signature, ratification and accession by the General Assembly resolution 2200A (xxi) of 16 December 1966 for similar provisions.
[81] In most jurisdictions the exceptions to the observance of public hearing in rear circumstance includes; National Security, public order and or reason of morality in some African counties. Thus, except for these limited exceptions, any verdict coming out of a non-public hearing proceeding is invalid and public hearing includes the pronouncement of judgment in the public. See Article 6 ECHR; ss.36 (3) and 1(3) of the Nigerian Constitution.
[82] Altaras, n. 30, 265.

emphasis on party autonomy and minimal control from the state. Businesspersons prefer to settle their disputes through arbitration because of privacy and confidentiality that is available in the arbitral process, and therefore waive their rights to a public hearing in arbitration proceedings, which by its very nature is consensual, private and devoid of unnecessary publicity.[83] The confidentiality and privacy ensures that parties' trade secrets and other privilege information that are so confidential remain their private information.[84] Thus, parties are at liberty to exclude any person from the hearing,[85] and arbitrators are under a duty of confidentiality of facts that came to their knowledge in the course of the proceedings. However, where resort to arbitration is not voluntary, as under the Trade Dispute Act,[86] the parties cannot be said to have voluntarily waived their right of access to court because such arbitration is statutory and mandatory in nature; thus the choice of arbitration therein is not a product of the exercise of the parties' will.[87] Nevertheless, it is contended that any statutory or constitutional provision requiring a public hearing of arbitration will not only negate and destroy confidentiality, which is a hallmark of arbitration, but will also be antithetical to the freedom of the parties and party autonomy.

The rules of natural justice are also enshrined in Chinese Arbitration Law.[88] The Honk Kong Arbitration Ordinance,[89] which applies to both the domestic and international commercial arbitration, provides that:

> When conducting arbitration proceedings or exercising any of the powers conferred on it by this ordinance or by the parties to any proceedings, an arbitral tribunal is required – (a) to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents[90]

The above can be contrasted with the position under the U K Arbitration Act 1996, which sets out the general duties of arbitrators/ tribunals to act *fairly* and *impartially* between the parties, giving both parties *reasonable* opportunity of putting forward their respective cases and challenging that of the other party.[91] The provision of s.33 (1) of the English Arbitration Act is however subject to s.34(2)(h) of the same Act, which empowers the tribunal to adopt flexible procedure in deciding "whether and to what extent there should be oral or written evidence or submission."[92]

The effects of a breach of the rules of natural justice

The observance of the rules of natural justice is necessary for the validity or otherwise of arbitral award s, which is the end product of arbitral proceedings. An arbitrator who knows any circumstance(s) likely

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[83] *Hankanson v Sweden* (A/171) (1991) 13 E.H.R.R. 1; *H v Belgium* (No. 1/1986/99/147); *Suovaniemi v Finland* (Case No. 31737/96)
[84] Chukwuemerie, n. 8, 253 – 254.
[85] Altaras, n. 30, 265.
[86] See s.9 Trade Dispute Act CAP. T8 Laws of Federation of Nigeria 2004
[87] ibid
[88] Chung, n. 2, 168.
[89] Cap 341 Section 2GA (1)
[90] Section 2G A (1) Honk Kong Arbitration Ordinance. The provision translates the common law rules of natural justice i.e. *nemo judex in causa sua* and *audi alteram partem* into statutory form. The provision is also in tandem with Article 12 and 18 of the Model Law of the United Nations Commission on International Trade law (UNCITRAL model law that is applicable to International arbitrations by virtue of Section 34 C of the Ordinance to treat the parties with equality). However, there are two notable differences: While Article 12 provides *"independence"* as distinct from impartially, as an actionable factor to challenge the Arbitrator; Article 18 requires that a *full* opportunity be given to the Parties.
[91] See s.33 (1) (a) of the 1996 Act
[92] It should, however, be noted that there are two significant difference between the 1996 Act of UK and the UNCITRAL Model Law on which it is partially based. *First, the Act omits the requirement of "independence".* Secondly, it does not require Arbitrators to make a disclosure *of interest.* The departmental Advisory Committee on Arbitration Law (DAC) saw no good reasons for including such a requirement, on the grounds that arbitration is consensual and lack of independence, unless it gives rise to justifiable doubts about the impartiality of the Arbitrator(s) is of no significance. See Chung, n. 2, 168-169.

to give rise to justifiable doubt as to his/her impartiality should disclose such circumstance to the parties before his appointment.[93] The duty to so disclose continues after appointment and throughout the proceedings.[94] An arbitrator who refuses to disclose may be challenged if circumstance exist that give rise to justifiable doubts as to his impartiality.[95] It is submitted that persons approached in connection with an appointment as arbitrator should not accept the same if they knows circumstance that might lead to suspicion of bias or doubt as to its impartiality and independence. Where however, such circumstance arises after he/she as already been appointed, s/he should honourably resign in order to protect his or her integrity and avoid eventual challenge to the arbitral award.

In the United Kingdom, the court may by an order remove an arbitrator if circumstance exist that give rise to justifiable doubts as to his impartiality or failure to conduct arbitral proceedings properly, thereby causing substantial injustice to a party.[96] There is no similar provision for removal of an arbitrator on the ground of impartiality and independence under the Nigerian Arbitration and Conciliation Act, the Act merely provides that an arbitrator can be challenged on the ground of impartiality and independence. However, by s.30(2) of the Nigerian Arbitration and Conciliation Act, an arbitrator can be removed on the ground of misconduct.[97] It is submitted that misconduct cover a wide range of irregular behavior, such as conflict of interest, bribery, bias, a breach of natural justice, improper conduct during and at the pendency of the submission, severe wrongful acts and technical error among other things.[98] In Hong Kong under the Arbitration Ordinance,[99] a court has power to remit any matter to the arbitrator for reconsideration and an appeal there from on any question of law is to the court.[100] The court may by order confirm, vary, set aside the award and or remit the award for reconsideration by the arbitrator.[101] Fairness and impartiality are two essential requirements an arbitrator must possess and exhibit in course of proceedings so that its award will not be set aside on the grounds of misconduct or breach of fair hearing.[102]

In Nigeria, the effect of breach of the rules of natural justice is provided for under the Arbitration and Conciliation Act. A party may challenge an arbitrator as to its impartiality and independence,[103] apply to the court for removal of an arbitrator on the ground of misconduct which include bias or breach of fair hearing,[104] apply to set aside the award on the ground that it was improperly procured (the rules of natural justice having been breached),[105] and or make a request to the court for refusal of recognition and or enforcement of an arbitral award for breach of fair hearing and natural justice.[106] A person cannot be an arbitrator in a matter if he has a personal interest in the matter. He cannot be a judge in his own cause. It is equally so if his spouse or relation has an interest in the matter. If the arbitrator manifests bias against any party in the proceedings, his award is liable to set aside for breach of the rules of natural justice even if the award went in favour of the person against whom the bias was shown.

Conclusion

The article has examined the historical evolution and importance of arbitration, and the application of the rules of natural justice in both statutory and customary arbitration in Nigeria. It reveals that an

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[93] Brawn, n. 44, 163. See also ss. 8(1) and 45(1) ACA.
[94] See ss. 8(2) and 45(2) ACA.
[95] Ibid. See also Section 26(1) Hong Kong Arbitration Ordinance Cap.341
[96] Section 24(1) UK Arbitration Act 1996.
[97] See also section 25 of the Hong Kong Arbitration Ordinance
[98] Chung, n. 2, 170.
[99] Sections 24 and 23(2)
[100] Chung, n. 2,170.
[101] Ibid
[102] Tailor, n. 51, 105.
[103] Sections 8 and 5 ACA; Brawn, n. 44, 163.
[104] Section 30(2) ACA.
[105] Section 30(1) ACA.
[106] Section 32 ACA.

arbitrator would be automatically disqualified from hearing and determining a reference to which he or she has a financial or non-pecuniary interest. An arbitrator may be challenged or removed by a court if he or she has misconducted him or herself, or circumstances exist that given rise to justifiable doubts as to an arbitrator's impartiality or independence. A court has power, and has in fact exercised that power, discreetly to set aside, remit, vary or declare unenforceable an arbitral award resulting from a breach of the rules of natural justice. The article however shows that it is difficult to maintain absolute impartiality, given that arbitrators may have views based on experience and knowledge, i.e. 'antecedent bias', and consequently it is difficult for them to come to proceedings with a fresh mind. Therefore, the real danger of bias or circumstances that may result in justifiable doubt as to an arbitrator's impartiality has been incorporated into the various statues and rules in different jurisdictions, which the courts have interpreted liberally, having regards to the fact and circumstances of each case.

The article observes that fairness and natural justice are legitimate expectation of parties and contends that the application of the rules of natural justice in arbitration, apart from been a fundamental right of parties, should also be a matter of statutory and regulatory sanction as well as including ethical personal values of the desire to observe the rules. In this respect, therefore, professional institutional bodies and the community at large should assist in promoting ethical values among arbitrators in order to cultivate a common desire to safeguard the rules of natural justice in arbitration.

As regards customary arbitration, the hitherto discrimination between slave and freeborn has been curtailed by the right to freedom from discrimination as guarantee by the constitution.[107] Thus, citizens of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion, shall not by any reason be subjected either expressly or by implication to any disabilities or restrictions. However, although a fair hearing and equality of parties are sacrosanct in customary arbitral proceedings, the major challenge is that in reality customary arbitrators do have prior knowledge of facts and their decisions may not totally be free from personal interest and *sub judice* of the arbitrators.[108] It is, therefore, recommended that members of native tribunals (customary arbitrators) should be encouraged to acquire skills and education on the importance of observing the rules of natural justice and equal treatment of parties in customary arbitration.

On the whole, an arbitral tribunal, like any other adjudicatory body, should do all things necessary and possible to ensure that its independence and impartiality is fully protected in order to enjoy to the full the undoubted confidence of the parties. This is because justice is rooted in the confidence of the adjudicator.

[107] See section 42 Nigerian Constitution.
[108] Afe Babalola 'Arbitration and ADR process in Traditional African System: Developments, success and Failures' Amasike C.J. (ed.) Arbitration and Alternative Dispute Resolution in Africa Abuja (The Regent Printing and Publishing S Ltd, Abuja, 2005) 58-59.

The alter ego model and the challenge of ambiguity: a review of Meridian Global Funds Management Asia Limited v. Securities Commission

Khairat Oluwakemi Akanbi*

Introduction and background

Determining corporate *mens rea* has been the most potent challenge to the development of corporate criminal liability. This is because the corporation being an artificial entity has no emotive feeling and the criminal law developed with the natural person in mind[1]. How then does the law fix the mental state of the artificial entity? It seems only two options were available. One is to close one's eyes to the idea that a corporation can commit a crime and continue to 'turn a blind eye' to criminal infractions committed by corporations. The other is to struggle to bring the corporation within the ambit of the criminal law and make it "fit" the requirements of the criminal law. The second option seems the better option, especially in view of the continuing and glaring incidences of corporate crimes.

Hence, there had been attempts over the years to develop a model for "corporate *mens rea*". In the course of balancing the gap and bringing the corporation within the purview of the criminal law via finding corporate *mens rea*, different attribution models have been developed across jurisdictions in the Commonwealth and beyond. Countries, especially commonwealth countries, have moved from merely limiting corporate criminality to only strict liability offences, to the application of the civil law vicarious liability model,[2] the alter ego model, the organization model, the management failure model, and lately the corporate culture model. It seems, however, that in terms of scope and length of use, the alter ego model has been the most successful model for determining corporate *mens rea*.

Yet, it is not without its challenges. One of which is highlighted by the decision of the Privy Council in *Meridian Global Funds Management Asia Ltd v. Securities Commission*.[3] This article discusses the alter ego model and finds that it is not without its limitations. It also reviews the *Meridian* case and argues that the decision was reached in error; it finds that such error is one of the reasons why the alter ego model is not the best attribution model as it is ambiguous and still awaits clear definitions, which are reflected by inconsistencies in judgments of the English courts. It therefore recommends that the better option will be to jettison the alter ego model and adopt the corporate culture model as developed in Australia. This will prevent ambiguities resulting in difficult and inconsistent court judgments.

The emergence of the alter ego attribution model

The alter ego[4] model was originally developed in England as a civil law principle. The case of *Lennards Carrying Co Ltd v. Asiatic Petroleum Co Ltd*[5] was one of the earliest cases where the model was propounded. Viscount Haldane was of the view that the mental element of the corporation could be found in the 'directing mind' of the corporation. It seems that the model supports the fiction theory of corporate personality and admits the abstract entity nature of a corporation. It projects that the

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[1] Khairat Oluwakemi Akanbi & Kafilat Omolola Mohammedlawal "Interrogating Challenges of Corporate Crime Control in Nigeria" (2020) 25 (2) *Coventry Law Journal*, 66-67

[2] The vicarious liability theory was adopted from the civil law of tort and means that a master is responsible for the acts of the servant done in the course of employment. One of the limitations of using this approach to determine the corporate *mens rea* amongst others is that the master's liability is only in respect of employee's actions and does not extend to directors. In this context, the master is the corporation.

[3] [1995] UKPC 5.

[4] Known as the identification and directing mind model.

[5] [1915] AC 705 HL

corporation exists only in the eyes of the law and that it can only act through its human agents. Under this theory, certain categories of persons within the company are to be regarded as the mind of the company, and it is the mind of these persons that the mind of the company is located. Thus, the corporate *mens rea* will be the *mens rea* of the directing mind. In this case, a ship owned by Lennards Carrying Co was transporting some goods to Asiatic Petroleum Co, but the ship sank and the cargo was lost. It was proven that the director of Lennards knew or ought to have known that the ship had defects that led to its eventual sinking. The question in issue was whether the knowledge by the director of Lennards could be imposed on the company. It was held by the House of Lords that the company could be liable for the acts of the director as the director is a directing mind of the company. Per Viscount Haldane:

> …a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.

Lennard's case seems to solve the problem of corporate *mens rea* for a while as cases decided after it followed the approach. For example, the 1944 trio of *DPP v. Kent & Sussex Contractors Ltd,*[6] *R v. ICR Haulage Ltd,*[7] and *Moore v. Bresler,*[8] all adopted the alter ego model to extend criminal liability to corporations for offences requiring *mens rea*. Thus, it became settled that those who control the affairs of the corporation could be regarded as the embodiment of the corporation and have the corporate *mens rea*.

Initially, the anthropomorphic approach, made famous by the dictum of Lord Denning in *H L Bolton & Co v T J Graham & Sons,*[9] was used in explaining the alter ego model. He likened a company to a human being with limbs and brains. He held that some people within the company are like hands and legs with which the company moves, while others are like the brain and nerve centre that controls what it does, and that the directing mind should be regarded as the brain that controls what it does. Therefore, the persons regarded as the brain and nerve centre are the directing mind and will, the alter ego of the company, and it is in them that the corporate *mens rea* is located. In practical terms, the directors of a company or persons under the direction of the shareholders, the board of directors or a person with authority co-ordinate with the board of directors given to him under the articles of association, are the directing mind or alter ego of the company.

This approach was consolidated in the case of *Tesco Supermarkets Ltd v Nattrass,*[10] where the House of Lords refused to identify a local manager of a supermarket chain as its directing mind. In this case, Tesco advertised a sales discount on one of the products. The adverts were through posters displayed at their stores. After a while, they ran out of stock on the discounted products and replaced it with the normal priced product. However, a manager of one of the branches of Tesco failed to remove the poster that advertised the discount. Hence, a customer was charged the normal price that was higher than the discounted price on the poster. Tesco was charged with an offence under the Trade Descriptions Act 1968 for false advertising. In its defence, it pleaded due diligence and that the conduct of the manager could not be attached to the company. At trial, Tesco was convicted on the ground that the store manager could not be treated as "another person" for the purpose of satisfying the defence under the Trade Descriptions Act 1968,[11] because he represented the company in respect of his supervisory duties. On further appeal to the House of Lords, it was held that the store manager could not be regarded as a directing mind and thus his conduct not attributable to the company. It was held that under the alter ego

[6] [1944] 1KB 146
[7] [1944] KB 551
[8] [1944] 2KB 515
[9] [1957] 1 QB 159.
[10] [1972] AC 153.
[11] Section 24

model, persons classified as directing mind must not be acting for the company but as the company itself and in this case the store manager did not qualify as such.[12]

As stated, this theory has proved to be the most successful in terms of jurisdictional scope and duration of use, and has also been applied in both civil and criminal cases.[13] Thus, countries like Australia, India, Malaysia, Canada and Nigeria have all adopted the alter ego theory in varying degrees. In the Australian case of *Trade Practices Commission v Tubemakers of Australia Ltd,*[14] the court held that the corporate *mens rea* could be attributed to the board of directors, managing director or someone to whom the full management powers had been delegated.[15] While the concept of corporate criminal liability generally still remains unsettled in Malaysia because of some conceptual problems,[16] the alter ego model has been adopted and used in a number of cases. For example, in *Yue Sang Cheong Sdn Bhn v Public Prosecutor,*[17] the Malaysian federal court held that the *mens rea* of a company is to be determined from those entrusted with the exercise of the powers of the company, in other words, the directing mind of the company. Similarly, the High Court in *Public Prosecutor v. Kedah & Perlis Ferry Service Sdn Bhd,*[18] where the company was charged with knowingly being in possession of un-customed goods, held that the company was not guilty as the officers and agents of the company had no knowledge that the goods were un-customed. Thus, the company's *mens rea* will be that of its officers and agents.[19]

In the Indian case of *Iridium India Telecom Ltd v. Motorola Inc. & Others,*[20] the alter ego approach was also adopted. In this case, Iridium India Telecoms invested in a business at the instance of Iridium Inc., which was a subsidiary of Motorola Inc. The project failed and Iridium Inc. filed for liquidation. Consequently, Iridiun India commenced a criminal action against Motorola Inc. for criminal conspiracy and cheating. At the High Court, it was held that Motorola Inc. was incapable of committing the offence of cheating and criminal conspiracy because it had no *mens rea*. This decision was quashed on appeal and the Indian Supreme Court held that a corporation was capable of *mens rea* and such *mens rea* can be found in persons who control the affairs of the corporation. It adopted and justified the alter ego theory that the directing mind of the company must be such that it will be obvious that the company thinks and acts through them.

With respect to Nigeria, the alter ego model has been adopted, but only in respect of civil cases.[21] In *Nigerian Bank for Commerce & Industry v. Integrated Gas (Nig) Ltd,*[22] the Court of Appeal affirmed the decision of the trial court and held that:

> It must be realised that although a company is a separate legal person, it can do nothing for itself nor think for itself since it is a fiction and does not exist in the physical world...certainly not all biological persons working for and within a company will one look up to determine the mental manifestation of the company....the directors, managers, the general managers or

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[12] It should be noted that the issue of delegation of responsibility was seen as due diligence on the part of the company

[13] *El Ajou v. Dollar Land Holdings Plc* [1994] 2 ALL ER 85 CA

[14] (1983) FCA, 99

[15] This principle has equally been applied by Nigerian courts as evidenced by the cases of *Nigerian Bank for Commerce and Industry v. Integrated Gas (Nig) Ltd* (1999) 8 NWLR 613, 129; and *Adeniji v. State* (1992) 4 NWLR 597, 53.

[16] Hasani Moh'd Ali " A Review of Corporate Criminal Liability in Malaysia" (2008) ICCLR 192

[17] (1973) 2MLJ 77

[18] (1978) 2 MLJ 221

[19] However, as stated, the concept of corporate criminal liability remains unsettled in Malaysia. Therefore, the courts have not been consistent in their approach to the corporate mens rea. Thus, both the vicarious liability and alter ego approaches are being used.

[20] AIR (2011) SC 20

[21] There is a long line of civil cases where the alter ego approach has been adopted. Thus, it is safe to assert that the alter ego has been solidly engraved in the Nigerian civil law. See *Trenco v African Real Estate Ltd* (1978)1LRN 146, *Faith Enterprise Ltd v Basf (Nig) Ltd* (2001) 8 NWLR (pt.715) 62, Adeniji v. State (1992) 4 NWLR pt.597, 53

[22] (1999) 8 NWLR pt. 613, 129

> the managing directors, represent the directing mind and will of the company and control what it does. The state of mind of this category of officials is the state of mind of the company and is treated by the law as such.

However, Nigeria is yet to have definite direction with respect to the corporate *mens rea.* Thus, corporations are only prosecuted for strict liability offences.

Successful, yes, but, a perfect model?

The "success" of the alter ego model is probably because it provided the first definitive approach to the problem of corporate *mens rea,* as hitherto the civil law vicarious liability model was used.[23] It represented a better alternative to the vicarious liability that was too wide and contradicts the concept of individual liability that is the hallmark of the criminal law.[24] It has proved to be especially good in prosecuting small one-man corporations as the directing mind is easily linked with the crime. Besides, in small corporations, it is practically impossible for the directing mind not to "know" when the company has committed infractions against the criminal law.[25]

However, the fact that only a selected few of "the directing mind(s)' are those whose acts can be attributed as the company's acts can also be a disadvantage. This is especially true in large corporations, where corporate actions are a result of a systemic process rather than a specific action by a particular person or group. Besides, the reality of corporate practice suggests that it may be difficult to envisage that the directing mind will actually commit the *actus reus* and *mens rea* of the offence. For example, in *Attorney General's Reference No2 of 1999*,[26] the reality of the directing mind being disconnected from the commission of a criminal offence is reflected. Here, the court's opinion was sought in respect of whether a non-human defendant can be convicted without the guilt of its directing mind.[27] The criminal prosecution commenced as a result of an accident involving collision of two trains that killed seven people leaving several others injured. There was evidence that the safety devices on the HST had been switched off, which caused the driver to miss the signals of impending red. In addition, the driver was a lone driver without any competent person beside him. These facts supported the argument that the company had been negligent in the conduct of its business. Thus, one of the issues was whether the company owner of the HST could be convicted of gross negligence manslaughter, despite the fact that the directing mind was not involved in the act. It was argued for the prosecution that it was not necessary to follow the alter ego; rather the ingredients of the offence itself should be a factor in determining the theory of attribution to use.[28] The case for the defendant was that it is impossible to find a company guilty unless its alter ego is identified and linked with the crime. The court agreed that a non-human defendant could not be convicted of gross negligent manslaughter without the guilt of its directing mind. From this case, it is apparent that the alter ego may not be a suitable model for prosecuting large corporations as the directing mind may be so disconnected from the offence.

In addition, the theory has the propensity to make the corporation an innocent victim in cases when the directing mind acts contrary to the corporation's policy. In *Moore v. Bresler*,[29] the court held that a company may be liable for the acts of its servant even if the act was committed to the fraud of the

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[23] See *Moussel Brothers Ltd v London & North-Western Railway Co* [1917] 2KB 836

[24] The application of the vicarious liability to corporate *mens rea* means that the company will be liable for the acts of its officers and agents done in the course of employment. This had the propensity to punish innocent companies unduly for acts of its officers and agents. This is unlike the identification model approach that limits the category of officers of the company whose acts can bind the company to those who are in actual control of the company.

[25] For example, see *R v. Kite & Oll Ltd* (1996) 2 Cr. App. R (S) 295 42, See also Amanda Pinto & Martin Evans, *Corporate Criminal Liability* (London, Sweet & Maxwell 2008) 221

[26] (2000) 2 Cr. App. R. 207

[27] The Attorney General referred two questions for the court's opinion by virtue of section 36 of the Criminal Justice Act 1972

[28] This argument seems to have been influenced by Meridian.

[29] [1994] 2 All ER 515

company itself. In this case, the branch manager who also doubled as secretary of the company together with a sales manager, sold some of the company's goods with intent to defraud the company. In the process, they made some false returns on purchase tax contrary to s.5 of the Finance (No2) Act, 1940. Both the company and the two officers were charged for an offence under the Act. The company was initially convicted, but on appeal to the Quarter Sessions the conviction was quashed on the ground that the sales were not executed on behalf of the company but done as a fraud against the company. However, on further appeal to the King's Bench Division and relying on the alter ego principle, the conviction was restored on the ground that the officers' actions were the actions of the company.

Another important limitation of this model is the fact that it has not been stretched to determine the level of delegation needed to transfer the directing mind, if at all. However, it has been suggested that the delegation of day-to-day functions is insufficient to justify the attribution of the directing mind.[30] Besides, another shortcoming of this model is the fact that it is derivative and not personal since reliance is being placed on the human agents and not the corporation itself.

Perhaps, the greatest challenge to the model is where to locate the *mens rea* if it is proved that the directors were not in actual control at the time of the commission of the offence. These limitations show that after more than a century, the alter ego model still awaits clear definitions. This ambiguity is reflected in the inconsistencies that has trailed its application by English courts, especially after the decision in the Meridian case.

The decision in *Meridian Global Funds Management Asia Ltd v Securities Commission*

This case mirrors some of the challenges associated with the alter ego model.[31] In this case, two employees of Meridian Global Funds - K the chief investment officer and N, senior portfolio manager - both sought to fraudulently gain control of a New Zealand company known as Euro National Corporation Limited, (E.N.C.). They both bought 49 per cent shareholding of E.N.C in the name of the company without the knowledge of the board of directors and the managing director. Meanwhile, the New Zealand Securities Amendment Act 1988 required that the identity of any person who becomes a substantial shareholder in a public issuer should be disclosed to both the stock exchange and the target company. Thus, Meridian had acquired 49 per cent shares, which is a substantial share in E.N.C., and had not made the required disclosure because the purchase was concealed from it by both K and N. The Securities Commission instituted proceedings against Meridian for violating the provisions of s.20 (3) of the Act, which provides that:

> Every person who, after the commencement of this section, becomes a substantial security holder in a public issuer shall give notice that the person is a substantial security holder in the public issuer to - (*a*) the public issuer; and (*b*) any stock exchange on which the securities of the public issuer are listed.

The trial court held that in order to satisfy s.20 (4) (e), which provides that the notice must be given as soon as the person knows or ought to know that he is a substantial shareholder of a public issuer, the knowledge of K and N should be attributed to Meridian. Thus, Meridian "knew" that it had substantial shares in E.N.C. by November 9 when its employees knew. On appeal to the Court of Appeal in New Zealand, the conviction was upheld on the basis that K was a directing mind of Meridian. It seems this position was strengthened by the fact that K used to be the managing director of E.N.C and there was no evidence before the court that some of his activities were supervised by the board and the managing director, even though he reported in theory to the managing director.[32]

On further appeal to the Privy Council, Meridian argued that it did not have either constructive or actual knowledge of the fact that it had acquired shares in E.N.C. at the time it acquired the shares. It also argued that K was not its directing mind so his knowledge should not be attributed to it. The argument

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[30] C Wells, *Corporations and Criminal Responsibility,* 2nd Edition, (Oxford, Clarendon Press, 2011)98.
[31] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 JCPC
[32] At 502, 505

went further, that its directing mind will be the board of directors and the managing director, since K was neither; he cannot be treated as its directing mind. The duties he performed falls under the supervision and control of the managing director.[33] This argument was rejected by the Privy Council, which dismissed the appeal. It held, per Lord Hoffmann, that ordinarily, rights and duties of companies are determined by primary rules of attribution contained in the company's constitution and implied by the rules of agency and/or company law. However, that if following the rules would defeat the objective of the law, it becomes imperative to devise a special rule of attribution to determine whose acts should bind the company for the purpose of the specific law. Hence, as the purpose of the Act was to ensure the immediate disclosure of the identity of substantial shareholders, in the case of a corporate shareholder the knowledge of a person who had the authority of the company to acquire the shares should be attributed to the company. He said that it is a matter of construction in each particular case whether the particular Act requires knowledge that an act has been done or the state of mind with which it was done. It held that on that basis, K was a directing mind of Meridian.

This decision of the Privy Council set an ambiguous precedent. It suggests that a corporation can be criminally liable for offences carried out by an employee who is not part of the directing mind of the corporation, subject to the provisions of the statute creating the offence. The court was influenced more by the desire to enforce the legislation, and this affected the interpretation of the directing mind since there was no proof that K had the ultimate authority to make decisions for the company as at the time of the purchase. Besides, there was no evidence that the internal control mechanism of the company was inadequate in a way to suggest culpability or even negligence on its part.[34] The Privy Council seems to create a distinction between the application of rules of attribution for common law offences and statutory offences. This distinction cannot be justified. Thus, Meridian was an innocent victim. In addition, it is doubtful whether the alter ego includes the situation when the purported acts "of" the company is one which was not intended or planned for the company's benefit, as was clearly the case here.

Meridian has therefore clothed the alter ego with vagueness and ambiguity that has led to inconsistencies in cases decided after it; thus, it was described as an imperfect guide.[35] For example, in *Attorney General's Reference,*[36] the Court of Appeal reaffirmed that the primary directing mind and will rule still applies,[37] and that the identification/alter ego principle is still the rule of attribution in criminal law, thus, the company's guilt is tied to the directing mind.

However, earlier, in the case of *R v Roziek*,[38] the approach laid down in *Meridian* was adopted. This case involves some form of reversal of roles, as the company was the victim and not the defendant. The defendant had applied for funds to purchase some equipment for two financial companies but gave some false information in respect of the equipment. He was subsequently charged under the Theft Act 1968 for obtaining property by deception. It was argued in his defence that the branch manager of the finance company knew about the false information, so the company was not deceived. He was nevertheless convicted. On appeal, it was argued that the knowledge of the branch manager should be attributed to the company, hence the company knew and was not deceived. Thus, the state of mind of the branch manager, who is ordinarily not a directing mind, was attributed to the company following the decision in *Meridian*.

Later, in *K R v Royal and Sun Alliance Plc,*[39] the court decided that the director of a company was the directing mind and not a junior employee. This case involved an insurance policy containing an exclusion clause for damage or injury done through deliberate actions of the insured. The majority

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[33] Ibid.
[34] At 503
[35] Buxton L.J dissenting in *Odyssey v OIC Run-Off Ltd* (2000) W.L. 19127 (CA).
[36] See (2000) 2 Cr. App. R. 207.
[37] Per Rose L.J.
[38] [1996] 3 All ER 281, 286.
[39] [2006] EWCA Civ. 1454.

shareholder and director of a children's home was guilty of abusing children. The question was whether his acts could be regarded as the deliberate acts of the company for the purpose of the exclusion clause. It was held that the purpose of the exclusion clause was to exclude liability when the injury was caused by the deliberate acts of people who could be regarded as the company and not just mere employees, and the majority shareholder guilty of the abuse was clearly an embodiment of the company and therefore its directing mind. Thus, his deliberate acts will be treated as satisfying the requirements of the exclusion clause; it is immaterial that the victims were third parties. Also, in *R v St Regis Paper Co Ltd,*[40] the Court of Appeal held that, in contrast to Meridian, that attribution could not apply in the context of a charge relating to the dishonest recording of environmental pollution control (an offence that required *mens rea)*. This was because the responsible employee in question who had made the false entries was not the directing mind of the company.

In 1994, the Court of Appeal, in the case of *R v British Steel,*[41] again followed the position laid down in *Meridian*. Here, British Steel employed two independent contractors to work on their site under their supervision and with their equipment. Their job was to move a steel platform by crane. In the course of carrying out their duty, the platform was cut without suspending it from the crane; one of the workers walked on a platform that fell on the other worker beneath it causing him to be fatally injured. The injury violated the provisions of s.3 of the Health and Safety at Work Act 1974, which places a duty on an employer to ensure that the health and safety of persons who are not its employees but who can be affected by its activities are protected. The defence for British Steel was that the statutory defence of reasonable practicability suffices as its directing minds had taken reasonable care by delegating supervision to one of its employees. The trial court rejected the argument and convicted British Steel. On appeal, the Court of Appeal dismissed the appeal and held that a corporate employer cannot avoid strict liability imposed by legislation simply by delegating its responsibilities. This case supports *Meridian* to the extent that a corporation cannot escape liability on the basis that the act constituting the offence was carried out by a person who is not a directing mind. Thus, the inconsistencies in the decisions by the English courts suggests that the alter ego model still awaits clarification and is such not the best attribution model.

Curiously, notwithstanding that, Nigerian criminal jurisprudence is yet to adopt an attribution model, the Nigerian company legislation, the Companies and Allied Matters Act,[42] seem to support the ambiguous *Meridian* position. The combined effect of ss.87, 89 and 90 is that persons whose fault can be attributed to the company need not be a director of the company if such person is delegated with the authority. This position contradicts the case law that follows the *Tesco* approach in civil cases.[43] Section 87 provides:

> A company shall act through its members in general meeting or its board of directors or through officers or agents appointed by, or under authority derived from the members in general meeting or the board of directors.

Similarly, s.90 reaffirms the position as it provides that a company will not ordinarily be bound by the acts of its officers and agents unless the members in general meeting, the board of directors or managing director has authorized such act either expressly or by implication. It further provides that such authorization can be prior the act or by subsequent ratification.[44] Thus, it is safe to assert that there are contradictions in Nigeria with respect to attaching liability to corporations. While, the civil case law strictly follows the definition of alter ego as laid down in *Tesco*, the statutory position is the wide and vague definition given in *Meridian*. These contradictions can influence the determination of an attribution model for corporate *mens rea* when the country is ready to adopt or develop one as the case may be.

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[40] [2011] EWCA Crim 2517.
[41] [1995] 1WLR 1356.
[42] CAMA 2019
[43] See Nigerian Bank for Commerce and Industry, supra
[44] Section 90

The way forward

The inconsistencies in the decisions of English courts suggest there is a need for redefinition and re-conceptualization of the alter ego model if it is going to be sustained as an attribution model. There are further questions to be resolved: whether the directing mind can be delegated; the extent of any delegation; what happens when it is proved that the directing mind was not in actual control at the time of the commission of the offence; and whether the discrepancy in its interpretation with respect to statutory and common law offences is justified. These are some of the issues still awaiting definite answers with respect to the conceptualization of the alter ego model.

Besides, in spite of its "success" it is still not the most effective way to attribute the corporate *mens rea*, essentially because it is derivative and contrary to the spirit of the criminal law that is founded on individual liability. As stated above, it is not suitable for prosecuting large corporations where the directing mind is often disconnected from the day-to-day activities of the corporation and by extension disconnected from the offence. In addition, it does not capture the true essence of modern corporate practice, where crimes are mostly committed because of a systemic failure rather than a deliberate act of a directing mind. After all, corporations are primarily formed for lawful purposes. The alter ego model, as evident in the decision of *Moore v. Bresler*, has the propensity to make the company an innocent victim when the directing mind act contrary to the company's directive or even as a fraud against the company. This is the case even when the wrong was committed without the primary intent to benefit the company, as seen in *Meridian*.

Conclusion

No doubt in terms of time and jurisdictional scope, the alter ego model has been the most "successful" attribution model. However, as seen in the course of this article, it is not without its limitations, which is evident by the fact that after more than a century it still awaits clarification. It is suggested that most of the limitations are difficult to surmount; especially the fact that it is derivative will always be a sore point. It is thus recommended that the corporate culture model developed under the Australian Criminal Code Act 1995 provides a better alternative. The main advantage being that it is not derivative but based on the personal liability of the corporation itself. In addition, most of the conceptual challenges of the alter ego model are not applicable to the corporate culture. It is hoped that the English courts, and by extension other courts in the commonwealth where the alter ego model is in use, will in due course consider the corporate culture model. It is also recommended that the Nigerian company and criminal jurisprudence will build a synergy and adopt the corporate culture model.

Are legal fictions still useful? Legal fiction in English common law

Dr Tony Meacham*

Introduction

There appears to have been a lot written on the matter of legal fictions. At first blush the topic recalls the title of Shakespeare's 'Much Ado about Nothing'. However, the use, and alleged abuse, of legal fictions comes closer to Albert Camus who said, "Fiction is the lie through which we tell the truth." There are champions of the uses of fiction in law, and those who see it as the antithesis of law's claim to certainty and truth. There are also different theories about such fictions, and its use as a linguistic device. This article will emphasise its legal use, and its attempts to clarify or simplify the law

The American legal philosopher Lon Fuller observed, "[t]here is scarcely a field of law in which one does not encounter [legal fictions]."[1] One may ask, what is 'legal fiction', outside of course popular novels with a legal theme, or literary devices such as metaphors? There are many views on this issue going through the centuries past, citing obvious untruths to facilitate the operation of the common law, or "posed propositions" which offer a premise to achieve a result. They are said to "lack the "generative potential of metaphors" as "metaphors spur on the imagination to make further connections".[2] yet many are. The advantages and disadvantages of such fictions in law were wryly stated by Morris Cohen when he observed that:

> [l]egal fiction is the mask that progress must wear to pass the faithful but blear-eyed watchers of our ancient legal treasure. But though legal fictions are useful in thus mitigating or absorbing the shock of innovation, they work havoc in the form of intellectual confusion.[3]

Cohen observes the necessity of legal fictions, at the same time noting such contradictions strain its utility. On the question is "[f]iction of use to justice?" there have been many views on both sides. One perspective is that it is, as Bentham opined, "[e]xactly as swindling is to trade".[4] The idea of using fiction at first glance appears to be antithetical to the idea of law, as law relies on facts.[5] Yet even mathematics is familiar with the notion of fiction.[6] This article explores the historical origins of the creation of this fiction, the varieties of its application across a number of jurisdictions, and the contemporary difficulties of students and practitioners of law of the application of a fiction, the existence of which is problematical, but its utility undeniable.

What then is a legal fiction?

A legal fiction is a device that is created by a court to create legal rules or aid in making decisions and is often, but not exclusively, used in common law jurisdictions. They have the benefit of allowing a

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[1] Lon Fuller, *Legal Fictions* (1967).

[2] Simon Stern, 'Legal Fictions and Exclusionary Rules' in Maksymilian Del Mar and William Twining (eds.), *Legal Fictions in Theory and Practice, Law and Philosophy* (Springer 2016).

[3] Morris R. Cohen, *Law and the Social Order: Essays in Legal Philosophy* (New York: Harcourt, Brace, 1933),126

[4] Jeremy Bentham, *Works* 283 (Bowring ed. 1843).

[5] Dennis Patterson, *Law and Truth* (OUP 1996).

[6] Michael Liston, 'Taking mathematical fictions seriously' (1993) 95 *Synthese* 433. I remember fondly studying complex numbers in high school, including the notion of the square root of minus one, an 'imaginary number'.

principle to be understood without variations invalidating that principle. Such a fiction has been defined as:

> [b]y fiction, in the sense in which it is used by lawyers, understand a false assertion of a privileged kind, and which, though acknowledged to be false, is at the same time argued from, and acted upon, as if true.[7]

Another has offered, "fictions are means of changing the application of the law by relying on a tension between two classifications of fact."[8] The nature of this tool is as a linguistic device:

> Anyone who has thought about the legal fiction must be aware that it presents an illumination of the all-pervading power of the word ... [W]e are here in contact with the mysterious influence exercised by names and symbols. In that sense, the fiction is: a linguistic phenomenon ... [T]he inaccuracy of a statement must be judged with reference to the standards of language usage. Simple as this truth is, nothing has so obscured the subject of legal fictions as the persistent failure to recognize it.[9]

Sir Henry Maine has suggested that legal fictions are a means of incremental or interstitial legislation, some form of abstract or archetypal legislation.[10] The fictions allow the courts to address similar facts and contexts. In this sense, they address some of Bentham's critiques in following some form of rule structure, short of formal legislation, in the customary practices of the English common law. Maine explains that while law may remain static, society does not and progresses, leaving legal fictions, Equity and legislation to bridge the gap. He considered fictions to be "invaluable expedients for overcoming the rigidity of law."[11]

The utility of a legal fiction is that it is an enabler. It allows the law to be applied to novel questions, "through analogy, arguments of equivalence, and what only can be described as leaps of faith.[12] Some, as outlined below, are clearly untrue. Most are just metaphors, such as a company being treated as if it were a person for legal purposes.[13] These fictions have been characterised as "the growing pains of legal language."[14] Such language is provided by "analogies, metaphors, and categories to help us find meaning in—and hopefully understand—the language of the law."[15]

Alf Ross has observed that there is a "creative legal fiction" which extends by analogy existing legal rules, asserting some form of equivalence through fiction. He uses the example:[16]

> To say that a barbarian is a Roman citizen amounts to extending for foreigners the application of the procedural rules that have hitherto been confined to Roman citizens. To say that Bordeaux is in Middlesex amounts to saying that the rules … hitherto … confined to claims originating in England, are now … extended … [to] claims originating in other countries.

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[7] Jeremy Bentham, "Constitutional Code," Works, Vol. JX, Bowring, ed., at. 77-8, reprinted in C.K. Ogden, *Bentham' Theory of Fictions* (New York: Kegan Paul, 1932), cxvi.
[8] Kenneth Campbell, 'Fuller on Legal Fictions', (1983) 2(3) *Law and Philosophy* 339, 339 (attributed to Lon Fuller).
[9] Lon L. Fuller (1930) 'Legal Fictions,' (1930) 25 *Illinois Law Review* 363, 371.
[10] Henry Maine, *Ancient Law* (1917 ed.), 16-18
[11] Henry Maine, *Ancient Law* (1917 ed.), 24-26.
[12] Lon Fuller, *Legal Fictions* (1967), 21-22.
[13] Nancy J. Knauer, 'Legal Fictions and Juristic Truth,' (2010) 23 *St Thomas Law Review* 70, 79.
[14] Lon Fuller, *Legal Fictions* (1967), 21-22.
[15] Alina Ng Boyte, 'The conceits of our legal imagination: Legal fictions and the concept of deemed authorship', (2014) (17 (7) *Legislation and Public Policy* 707, 709.
[16] Alf Ross 1969.'Legal fictions' in Graham Hughes, *Law, Reason, and Justice*, 222. (New York: New York University Press, 222

Legal fictions are by no means a recent tool. In Roman Law, "to efface the unfavourable consequences of an emancipation, it was declared not to have happened - a daughter was proclaimed a son, a stranger was declared to be a citizen so that he might be given the right of inheritance, and children were attributed even to the chaste Diana."[17] Praetors were said to set aside wills that disinherited their children, or did not sufficiently provide for them, on the basis that their fathers must be insane.[18]

The English Common law is replete with such curiosities. One such is the Writ of Quominus, which was a fiction designed to allow the Court of Exchequer jurisdiction over cases usually the business of the Court of Common Pleas. Plaintiffs in debt cases were encouraged to claim that they were in debt to the King, and that the defendant's failure to pay the plaintiff prevented the plaintiff repaying the King. By this mechanism, the defendant could be arrested and the case would be heard by the Court of Exchequer. This was similar to the Bill of Middlesex used by the Court of King's Bench. This device was used between the thirteenth and late nineteenth centuries, removed only by the new Civil Procedure Rules of the Supreme Court of Judicature in 1883.[19] More clearly fictional examples are "when the island of Minorca is said to be located within the parish of Mary-le-Bow in the ward of Cheap in the city of London".[20]

Debates on the utility of legal fictions

Although they have utility in many circumstances (as shall be discussed below), not all find fiction in law valuable. One of the earliest critics of the principle was Jeremy Bentham. He was not shy in expressing his disdain, using phrases such as that legal fiction " … affords presumptive and conclusive evidence of moral turpitude in those by whom it was invented and first employed," that "Fiction, tautology, technicality, circuity, irregularity, inconsistency remain. But above all, the pestilential breath of Fiction poisons the sense of every instrument it comes near", and if his readers were not in any doubt, that "Unlicensed thieves use pick-lock keys; licensed thieves use fictions."[21] This is by no means all of his views on the matter. These views do however tend to clash with his more moderate observations, creating what has been described as the "Two Benthams".[22] Bentham was in a minority in his views, however.

Bentham's views on legal fictions were most likely an indication of his dissatisfaction with the common law, where he felt that it common law was inaccessible to the people who were subject to it, and that codification would render the law comprehensible and internally consistent. Legal fictions worked against that ideal.[23] For Bentham, legal fiction acted against the certainty of legislation, "having for its object the stealing legislative power,"[24] and enhancing in his view a partnership between the monarch and the judiciary.[25]

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[17] Raphael Demos, 'Legal Fictions', (1923) 34 *International Journal of Ethics* 37, 38.
[18] Raphael Demos, 'Legal Fictions', (1923) 34 *International Journal of Ethics* 37, 39, citing Austin (*Jurisprudence*, II, 637)
[19] Now the "Senior Courts of England and Wales".
[20] *Fabrigas v Mostyn* 1 Cowp. 161, 164 (1774)), cited in Eben Moglen, *Legal Fictions and Common Law Legal Theory: Some Historical Reflections* < Legal Fictions and Common Law Legal Theory (columbia.edu) > (accessed 4 July 2021).
[21] *Theory of Fictions*, supra note 2 at cxvii, xvii, 146.
[22] Nomi Maya Stolzenberg, 'Bentham's Theory of Fictions – A "Curious Double Language" ', (1999) 11 *Cardozo Studies in Law and Literature* 223, 226.
[23] Louise Harmon, 'Falling off the vine: Legal fictions and the doctrine of substituted judgment', (1990) 100 (1) *The Yale Law Journal* 1, 4.
[24] Jeremy Bentham, Preface for The Second Edition to (1838) *A Comment on the Commentaries and a Fragment on Government* 509.
[25] Louise Harmon, 'Falling off the vine: Legal fictions and the doctrine of substituted judgment', (1990) 100(1) *The Yale Law Journal* 1, 4.

Sir William Blackstone was aligned entirely differently, defending the idea of legal fictions in his Commentaries.[26] He felt that they were a "troublesome, but not dangerous" evil. He supported their use by reference to legal precedent, citing a fiction that contracts that had been made at the Royal Exchange in London, despite the exchange of promises having been made at sea. Such fiction removed the jurisdiction of the case from the Court of the Lord High Admiral. When an individual argued that such a fiction was "inequitable and absurd", Blackstone advised that "[T]hat learned civilian himself seems to have forgotten how much such fictions are adopted and encouraged in the Roman law .... "[27] Yet Blackstone's defence of such fictions has been seen as questionable: using a legal fiction, not to enhance a judgment or to give clarity to the law, but simply to give jurisdiction to one court at the expense of another.[28]

Bentham showed his disdain for Blackstone's approach when he argued that:

> If there be one purpose for which a book of Institutes is wanted more than another, it is to draw aside that curtain of mystery which fiction and formality have spread so extensively over Law. Our Author [Blackstone] thinks he does his part when he embroiders it with flowers. Law shews itself in a mask. This mask our Author instead of pulling off has varnished.[29]

Blackstone, for his part, felt that legal fictions were "highly beneficial and useful", and if a "mischief" or an "inconvenience" might be the outcome of a case without them, then its use was warranted, limited only by the maxim "no fiction shall extend to work an injury".[30]

Other legal philosophers also weighed in on the debate. John Austin disagreed with Bentham that legal fictions delude judges. On his views on their use in Roman times, Austin criticised him that, "It is ridiculous to suppose that such fictions could deceive or were intended to deceive: or that the authors of such innovations had the purpose of introducing them covertly."[31]

In the twentieth century the debate continued. Roscoe Pound stated that:

> Law grows subconsciously at first. Afterwards it grows more or less consciously but as it were surreptitiously under the cloak of fictions. Next it grows consciously but shamefacedly through general fictions. Finally it may grow consciously, deliberatively and avowedly through juristic science and legislation tested by judicial empiricism.[32]

He expanded on this point in his textbook *Jurisprudence,*[33] where he divided fictions into three classes: 'particular fictions' which are procedural in nature and usually limited to one case ('employed to meet a particular type of case or to change or avoid a particular rule or effect a particular isolated result'); 'general fictions' which ('a more sweeping operation to alter or create whole departments of the law, introducing principles and methods rather than isolated rules' and which apply to whole genres of law such as Equity; and 'dogmatic fictions', which are 'fictions worked out after the event by juristic

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[26] William Blackstone, *Commentaries on the Laws of England* (1768).
[27] William Blackstone, *Commentaries on the Laws of England* (1768), 107.
[28] Louise Harmon, 'Falling off the vine: Legal fictions and the doctrine of substituted judgment', (1990) 100(1) The Yale Law Journal 1, 6.
[29] Jeremy Bentham, *A Comment on the Commentaries and A Fragment on Government* (J.H. Burns and H.L.A. Hart eds. 1977), 124.
[30] William Blackstone, *Commentaries on the Laws of England in Four Books, vol. 2* ((Philadelphia: J.B. Lippincott Co., 1893).
[31] John Austin, *Lecture on Jurisprudence or The Philosophy of Positive Law* (1874), 308.
[32] Roscoe Pound, *The Spirit of the Common Law* (1999 Transaction Publishers).
[33] Roscoe Pound, *Jurisprudence* (1959 West Publishing Co.)

thinking in order to give or appear to give a rational explanation of existing precepts', such as constructive trusts.[34]

S.F.C Milsom, author of *Historical Foundations of the Common Law*,[35] emphasised the practical aspect of legal fictions, dismissing the criticisms of Bentham. Where Bentham had argued that such fictions were used by judges who were 'stealing legislative power',[36] Milsom argued that the fictions came not so much from the judges but from lawyers, the "countless individual lawyers through the centuries, each concerned not with 'the law' as such but with a small immediate predicament of his client". The role of judges was passive in the creation of legal fictions, as '[t]hey might facilitate the later stages of a fictional development, but in the important early stages they just accepted results reached by others' [37] Del Mar is critical of this position though, suggesting that judges were likely to want to maintain the legitimacy of the law, and so moved the law on incrementally so as not to cause unforeseen outcomes. The role of fictions in the law, he argues, more likely "are a way of slowing down change - of treading carefully - creating resources for future courts, but ones which they are not compelled to respect".[38]

The work of the American Lon Fuller is the most prominent in this area. Fuller, well known for his Natural Law theory,[39] and his criticism of proponents of Legal Positivism such as H.LA. Hart,[40] is also known for a series of articles in the *Illinois Law Review* in 1930 on legal fictions, later published in 1967. He distinguished legal fictions from "'truthful statement[s],... lie[s], ... [and] erroneous conclusion[s],'"[41] and offered the definition that such fictions are "'either, (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility.'"[42] Fuller made clear, therefore, that such fictions were constructs that were not intended to deceive, and that the user of the fiction did not himself believe the fictional statement, and used the statement knowing it to be false. As Fuller pointed out, the creator of the fiction "either positively disbelieves it or is partially conscious of its untruth or inadequacy,"[43] and therefore is only dangerous when it is believed.[44]

In recent years, academics have sought to move on from Fuller's original thoughts. Although Fuller had identified some classes of legal fictions such as the above, Smith has argued that his list is incomplete, and a 'taxonomy' of new legal fictions is necessary. Knauer has argued that taxonomy is not necessary, but rather an emphasis on definition.[45] Petroski tends to agree, noting that since Fuller's writings in the 1930s, students have added examples since. However, she does not limit Fuller's work to just this, emphasising that his work identified legal fiction as a "linguistic phenomenon", extending its utility into other areas of thought.[46]

In more recently years, David Ibbetson has been more circumspect. He argues that "Legal change occurs through filling in gaps between rules" by a convenient twisting of existing rules or reapplication of old

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[34] Maksymilian Del Mar, 'Legal Fictions and Legal Change', (2013) 9(4) *International Journal of Law in Context* 442.
[35] Butterworths 1969.
[36] SFC Milsom, *A Natural History of the Common Law* (New York: Columbia University Press 2003), 27.
[37] SFC Milsom, *A Natural History of the Common Law* (New York: Columbia University Press 2003), 27.
[38] Maksymilian Del Mar, 'Legal Fictions and Legal Change', (2013) 9(4) *International Journal of Law in Context* 442, 457.
[39] Lon Fuller, *The Morality of Law* (Yale University Press 1964).
[40] H.L.A. Hart, 'Positivism and the Separation of Law and Morals', (1958) 71(4) *Harvard Law Review* 593.
[41] Lon L. Fuller (1930) 'Legal Fictions,' (1930) *25 Illinois Law Review* 363, 366.
[42] Ibid.
[43] Lon Fuller, *Legal Fictions* (1967), 9.
[44] Lon Fuller, *Legal Fictions* (1967), 9.
[45] Nancy J. Knauer, 'Legal Fictions and Juristic Truth,' (2010) 23 *St Thomas Law Review* 70.
[46] Karen Petroski, 'Legal fictions and the limits of legal language', (2013) 9(4) *International Journal of Law in Context* 485, 485.

ones in order to create a different impression. Rather than the law having been changed through fiction, the change is portrayed as merely the application of existing law, by:

> reformulating claims into a different conceptual category, normally one less encumbered by restrictive rules; through inventing new rules that get tacked onto the existing ones; through borrowing rules from outside the Common law; through injecting shifting ideas of fairness or justice; and, very occasionally, through adopting wholescale procrustean theoretical frameworks into which the existing law can be squeezed.[47]

This thereby changes through the 'initiative' of the 'litigants' incrementally providing justification for the remedy.[48] The debate on the nature and purpose of legal fictions continues. The applications of such fictions are as various as their critics.

Application of legal fictions

In contemporary law, there are many familiar uses and applications. We begin with the fiction that everyone is presumed to know the law and that ignorance of the law is no defence.[49]

In contract law, some consider the consent doctrine to be legal fiction. With technological advances with e-commerce presumptions and law based on the assumption of face-to-face meetings, in more recent times, clicking on 'Accept' on an online purchase comes with the assumption that the consumer has read the terms of the contract. This assumption is often considered to be a legal fiction.[50] Just the same, such contracts are enforced, as to do otherwise "contracts would not be worth the paper on which they are written."[51] The danger here in using such fictions is that such consent " … as used in contract law does not come with a linguistic label to remind us of its falsity. What is more, this fiction does not rest on complete factual falsity; instead, it reduces the evidentiary proof burden for judges."[52]

From there we are familiar with useful fictions such as the 'reasonable man' in explaining the duty of care in negligence in tort law, well known over much of the common law world.[53] We are also familiar with vicarious viability in tort, whereby an employer is responsible for the actions of their employees, the fiction being "what is done by one being taken as done by another."[54] A well know example is the House of Lords' decision in *McGhee v National Coal Board*.[55] In this case, McGhee had been employed by the National Coal Board. In his job of cleaning out brick kilns he was subjected to large amounts of brick dust. The court found that the employer had caused McGhee's dermatitis because it had prolonged his contact with the dust, and had not provided washing facilities. There are critics who argue that there is a legal fiction created here when the court linked the creation of a possible risk from harmful activity to an injury. By increasing McGhee's contact to the brick dust, Martin Hogg has argued, "[a]s a result of this decision, mere risk creation became sufficient in certain cases to satisfy a causal connection to

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[47] David Ibbetson, *A Historical Introduction to the Law of Obligations* (1999 OUP), 294.
[48] Ibid, 299.
[49] *ignorantia legis neminem excusa* (ignorance of law excuses no one."
[50] Chunlin Leonhard, 'Dangerous or Benign legal fictions, cognitive biases, and consent in contract law', (2017) 91(2) *St. Johns Law Review* 385, 407.
[51] *Upton, Assignee v Tribilcock*, (1875) 91 U.S. 45, 50. (Hunt J)
[52] Supra, n. 51, 425.
[53] Legal humourist A.P. Herbert parodied this fiction by speculating in the fictional case of *Fardell v Potts* by observing that there was not a corresponding 'reasonable woman' standard in the common law (A.P. Herbert, *Uncommon Law*, 645 < https://jollycontrarian.com/index.php?title=Fardell_v_Potts >. This parody was returned with interest by Caroline Forell, 'Reasonable Woman Standard of Care', (1992) 11 *University of Tasmania Law Review* 1, arguing that 'reasonable woman' is an oxymoron.
[54] Sidney F. Miller, 'The reasons for Some Legal Fictions', (1910) 8(8) *Michigan Law Review* 623, 627.
[55] [1972] 3 All ER 1008.

actual physical harm. Yet it is hard to see how risk creation can equate to causation."[56] An increase in risk of harm, being equated with causation, therefore creating a legal fiction.

Regarding children, as Boyte so well expresses", a child is treated as an adult when he reaches the age of majority; this is a legal fiction that creates a bright line rule because in reality, "children do not magically become adults when they turn eighteen."[57] When adopting children the fiction is even more clearly acknowledged, whereby following legal adoption,[58] a biological parent becomes a legal fiction, a legal stranger,[59] with the adoptive parent becoming the legally recognised parent, without having any biological connection, the law now conferring the status of legal parenthood. As Else notes, "[l]egal adoption meant that for the first time, it became possible to set aside birth status and the ties of bio-social kinship, and replace them with an officially sanctioned 'legal fiction' of conferred family relationships, even where no family relationship of any kind had previously existed."[60] Sir Henry Maine was even more effusive supporting the "fiction of adoption, which permits the family tie to be artificially created", without which "it is difficult to understand how society would ever have escaped from its swaddling clothes, and taken its first steps towards civilisation"[61]

A company is considered to be a person in law, separate from its members, for the convenience of allowing it to own property, sue and be sued, and to contract, and yet is a legal construct. Such legal personality as legal fiction was discussed by Walton J,[62] recalling "Viscount Haldane LC in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd,*[63] who submitted that the company as such was only a juristic figment of the imagination, lacking both a body to be kicked and a soul to be damned."

The 'Doctrine of Survival' principle is particularly interesting and is well known. In matters relating to inheritance or property, it is common that two people, usually married, will state in their will that the other will receive their estate upon their death, with the reverse the same. Section 184 of the Law of Property Act 1925 addresses the question of what would occur if both die at the same time (or it is impossible to tell otherwise). It provides that the younger of the two to have survived the elder, subject to rebuttal

Finally, the most recent and novel example is the issue in 2019 whereby the UK Prime Minister Boris Johnson was found by the Supreme Court to have unlawfully prorogued Parliament. Lacking the authority to reverse the process, it was held that the Parliament had been simply adjourned and hence the prorogation never officially happened.[64]

These are just a brief selection of well-known applications of legal fiction. However, in Equity, such fictions are essential to its application.

The special case of Equity

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[56] Martin Hogg, 'Re-establishing Orthodoxy in the Realm of Causation', (2007) 11(1) *Edinburgh Law Review* 1, 12.
[57] Alina Ng Boyte, 'The conceits of our legal imagination: Legal fictions and the concept of deemed authorship', (2014) (17(7) *Legislation and Public Policy* 707, 708 (note 3).
[58] Adoption and Children Act 2002. Section 67(1) states that 'An adopted person is to be treated in law as if born as the child of the adopters or adopter.'
[59] Janette Logan and Carole Smith, 'Adoptive parenthood as a 'legal fiction' - its consequences for direct post-adoption contact' [2002] CFLQ 281
[60] Anne Else, 'Legal Fictions: Women and New Zealand Law on Adoption and Assisted Reproductive Technologies' (1995) 5 The Australian Feminist Law Journal 65, 66-67.
[61] Sir Henry Maine, *Ancient Law* (OUP 1931), 22.
[62] *Northern Counties Securities Ltd v Jackson & Steeple* Ltd [1974] 1 WLR 1133.
[63] [1915] AC 705.
[64] *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland*) [2019] UKSC 41.

I begin here with the old maxim, '*In Fictione Juris Semper Aequitas Existit'* ('With legal fictions, equity always exists'). Blackstone observed that:

> And these fictions of law, though at first they may startle the student, he will find upon further consideration to be highly beneficial and useful, especially as this maxim is ever invariably observed, that no fiction shall extend to work an injury, its proper operation being to remedy a mischief, or remedy an inconvenience, that might result in the general rule of law. So true it is that *in fictione juris semper subsistit evquitas*.[65]

Sir Henry Maine saw the use of legal fiction in equity as a way to allow law to be changed, and to avoid the inflexibility of the common law, and that such fictions 'are invaluable expedients for overcoming the rigidity of law'.[66] In the law of Equity and Trusts in England and Wales, legal fictions are a large part of the subject. The common law provides for necessary legal certainties, but when those result in absurd or unfair outcomes, Equity must provide a resolution. In doing so, the law of Equity provides for a number of legal fictions, such as "equitable interests", dividing ownership of property into legal and beneficial interests. These fictions are as much as eight hundred years old. They plague students because they must contend with realities taught early in their law degrees, with the fictions that allow fairness and justice in their final year. As was noted by the Australian Bar Association, Equity for undergraduates there "had acquired a reputation as a bogeyman subject. Successive generations of students had stumbled upon its high failure rates before they had even contemplated course content. They were beaten before they started."

Equity in English law, and by extension, the common law world, has a role in which it 'mitigates the rigour of the common law' to ensure that in individual cases too strict an application of the common law results in injustice.[67] For centuries Equity has been seen as apart from the common law, an acknowledgement perhaps of its fictional nature and noted by Lord Cowper LC, when he observed that "[e]quity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness and edge of the law".[68]

Equity uses many fictions to achieve its ideals. One such is the concept of 'beneficial occupation'. This is well illustrated by the 1970 case of *Des Salles D'Epinoix v Royal Borough of Kensington and Chelsea*.[69] In this case, the ratepayer of the property left the marital home to take up residence elsewhere following marital discord, leaving his wife and children in occupancy. He remained liable as the property owner to pay rates but refused. Lord Parker CJ argued here that a person may still be in "beneficial occupation" of that property. This is, of course a clear fiction, with the ratepayer not in physical occupation of the property. However, it was argued that the payment of the rates formed part of his maintenance to his wife and children. This fiction therefore achieves a just result.

Equitable interests as a legal fiction in the law of England and Wales are recognised in statute under s.53(1)(c) of the Law of Property Act 1925, where the law seeks to trace their ephemeral existence in order to document their movements, and if possible, tax them. The utility and flexibility of this fiction as part of the English Common Law goes beyond the UK, especially as part of remedies such as resulting and constructive trusts, and has allowed the portability of these concepts to travel to all corners of the world, and for elements of it to be used in commercial environments.

Viscount Radcliffe's denial in Livingstone's case (*Commissioner of Stamp Duties (Queensland) v Livingston*),[70] that legal fictions in Equity

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[65] 3 *Blackstone's Commentaries* Ch. IV, 43.
[66] Sir Henry Maine, *Ancient Law* (OUP 1931), 22.
[67] 'to soften and modify the extremity of the law': *Earl of Oxford's Case* (1615) 1 Ch Rep1, per Lord Ellesmere LC.
[68] *Dudley v Dudley* (1705) Prec Ch 241; 24 ER 118
[69] [1970] 1 All ER 18.
[70] [1965] AC 694.

> for all purposes and at every moment of time the law requires the separate existence of two different kinds of estate or interest in property, the legal and the equitable ... Equity in fact calls into existence and protects equitable rights and interests in property only where their recognition has been found to be required in order to give effect to its doctrines

shows that he struggled with the popping in and out of reality of the fiction of equitable interests, and he was not alone. Its value as a legal tool requires it to be recognised as and when necessary, and for some to deny its existence when not being applied.

Alastair Hudson has explained the nature of equitable interests as originating from the idea that centuries ago landowners would go away for long periods of time, often for war, and so left their land in the hands of trusted others. To do so, legal title might be transferred to that trusted person under the common law, but in Equity effective title was always held by the person who left. That position has always easy to understand. Just because I left something with you to look after, does not make it yours.

However, the law of property in England has had difficulty in moving on from a logic based in land "because its ancient methods of understanding property as being necessarily something tangible and readily identifiable do not mesh easily with the sorts of disputes which have come before it in recent years concerning intangible property of a very different sort".[71]

Proprietorial interests were once described as 'property in thin air', where that property is comprised in large part as a term of 'illusory reference' and 'an emotive phrase in search of a meaning', arguing that the essential feature of property 'is that it does not really exist: it is mere illusion'.[72] Thus, Kevin Gray proposed the idea that proprietorial interests can be described as 'property in thin air', where that property is comprised in large part as a term of 'illusory reference' and 'an emotive phrase in search of a meaning' - arguing that the essential feature of property 'is that it does not really exist: it is mere illusion'. Equitable interests are more so, being intangible, and as a concept, the bane of law students everywhere to comprehend alongside general concepts of more tangible and better understood concepts in their studies of land law.

Conclusions: the utility of legal fictions, a thing of the past?

So, we know what it is, why it is, and where it has been. Does it have a future, or has its utility been replaced by other models or statute?

Views on the continuing utility of the legal fiction have been around for centuries. Even Bentham gave a grudging acknowledgement that they once had value, but their time was gone:

> With respect to this, and other fictions, there was once a time, perhaps, when they had their use. With instruments of this temper, I will not deny but that some political work may have been done, and that useful work, which, under the then circumstances of things, could hardly have been done with any other. But the season of Fiction is now over...[73]

Blackstone was agreed on this point with the rather colourful metaphor where he likened its demise as:

> We inherit an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless. The inferior apartments, now converted into rooms

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[71] Alastair Hudson, *Equity and Trusts* (3rd edn. 2013), 922
[72] Kevin Gray, 'Property in thin air' (1991) 50 *Cambridge Law Journal* 252.
[73] Jeremy Bentham, 'A Fragment on Government', in *The Works of Jeremy Bentham* (J. Bowring ed. 1843), 268-69.

> of convenience, are cheerful and commodious, though their approaches are winding and difficult.[74]

Sir Henry Maine, having acknowledged that legal fictions were valuable in overcoming the rigidity of law', also insisted that these fictions had gone past their use by date. He went on to say that legal fictions 'are the greatest obstacles to symmetrical classification. The rule of law remains sticking in the system, but it is a mere shell. It has been long ago undermined, and a new rule hides itself under its cover' and that '[i]f the English law is ever to assume an orderly distribution, it will be necessary to prune away the legal fictions' [75]

A much more modern and clearer argument is made by Boyte, who observes that good legal fictions facilitate understanding about the law and are sometimes essential to legal thinking. The distinction she makes in deciding whether they are beneficial or harmful depends however "on whether they serve as support structures that make the language of the law more logical and accessible or as blindfolds that deprive the scholar, the practitioner, and the public from truly understanding the law and what it stands—or should rightfully stand—for". In this respect, she is warning us that problems arise if we forget that these fictions are not real.[76]

Del Mar asks also whether legal fictions are a thing of the past. He asks rhetorically whether the common law has reached a sort of maturity where their utility is finished, and critics of legal fictions are justified in its demise. He answers himself emphatically that this is not so, that fictions rightly continue to be used, and without them "the common law would lose one of its most treasured instruments for creating potential change."[77]

Whether one is convinced of the remaining utility of legal fictions, the words of Oliver Wendell Holmes Jr here are apt:

> The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.[78]

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[74] William Blackstone, *Commentaries on the Laws of England* (1768), 268.
[75] Sir Henry Maine, *Ancient Law* (OUP 1931), 22-23.
[76] Alina Ng Boyte, 'The conceits of our legal imagination: Legal fictions and the concept of deemed authorship', (2014) (17(7) *Legislation and Public Policy* 707, 761.
[77] Maksymilian Del Mar, 'Legal Fictions and Legal Change', (2013) 9(4) *International Journal of Law in Context* 442, 460.
[78] Oliver W. Holmes Jr, *The Common Law* [1880].

COMPETITION LAW

The impact of Egyptian Competition Law on price fixing agreements and consumer welfare in Egypt

Shams Elmallah*

Introduction and background

The economic power and cartels, especially the monopoly, was initiated since ancient times. Then, *The Wealth Of Nations* was published in 1776 by Adam Smith, who stated that "People of the same trade seldom meet, even for merriment and diversion, but the conversation ends in a conspiracy against the public or some contrivance to raise prices."[1] Competition Law was adopted later, firstly by the developed countries then the developing countries following. By 1947, competition laws were considered in both ITO (International Trade Organization) and the Havana Charter.[2] Since the Second World War, it was perceived that the lack of competition law is detrimental to countries and nations, as a result of the free trade which removes the public barriers such as custom duties, and increasing the cartels and abuse of dominance chances.[3] One of the main reasons behind adopting competition law is attracting Foreign Direct Investment (FDI) in developing countries, as foreign investors prefer to invest in countries who have competition law and have a competition culture. Attracting foreign direct investors was one of the main pressures imposed on Egypt to adopt its competition law.

The negotiations of the Egyptian Competition Law started by the middle of the 1990s and ended by issuing the Egyptian Competition Law and regulations, which were introduced in 2005. One of the main goals of Egyptian Competition Law is consumer welfare, free trade and improving the competition culture. Although Egypt is considered to be an early adopter of competition law as one of the developing countries, its Competition Law has weaknesses, which affected and harmed the consumers by the lack of excessive pricing prohibition as a kind of abuse of dominance.

The main aim of this article is to analyse the impact of the price fixing agreement exemption and the non-prohibition of the excessive pricing provisions on the consumer welfare goal under Egyptian Competition Law. This article commences at the scheme of the competition law and the anti-competitive provisions. The article also discusses the Egyptian Competition Law regime, authorities, and goals. Then, there will be an analysis of the price fixing agreement exemption under the Egyptian competition Law, followed by the abuse of dominance and the non -prohibition of the excessive pricing under Egyptian Competition Law. Finally, the article ends by reflecting on the effect of both the price fixing agreement exemption and the lack of excessive pricing on the consumer welfare goal.

Scheme of competition law and anti-competitive provisions

The main purpose of the application of EU Competition Law is to achieve consumer welfare, through protecting the competition market and prohibiting any conduct which might distort competition law goals.:

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[1] Jonathan Faull and Ali Nikpay, *The Economics of Competition: The EC Law on Competition* (2nd ed, OUP 2007).

[2] Damien Geradin, 'The Perils of Antitrust Proliferation – The Process of 'Decentralized Globalization' and the Risks of Over- Regulation of Competitive Behavior' (2009) Chicago Journal of International Law <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1327688>, last accessed 05 Dec 2020.

[3] Damien Geradin and Nicolas Petit, 'Competition Rules in the Euromed Countries with a Special Emphasis on Network Industries' (2004) < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=489691 >, last accessed 05 Dec 2020.

> Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resource.[4]

The consumer welfare goal is clearly mentioned in EU competition law and in order to analyse the consumer welfare goal, it would be better firstly to clarify the consumer concept in the sphere of competition law, then explaining the consumer welfare concept and then analysing the consumer welfare as a goal under EU competition Law.

Firstly, the consumer concept is defined differently under t competition law from its definition under consumer protection law. Competition Law focused on the consumer's economic interest, while consumer protection law aims to protect much broader interests of consumers: such as the right to receive information, health and security.[5]The consumer concept in the sphere of competition law refers to any natural persons covered by the agreement directly or indirectly:

> The concept of 'consumers' encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession.[6]

Secondly, the consumer welfare approach is the currently dominant approach in EU Competition Law. It has been advocated by the Commission and it is obvious in many cases, such as *Greening Washing Machines*.[7]

Thirdly, the consumer welfare goal is a priority under the EU competition law. The main aim of the anti-competitive agreements' prohibition is to prevent any agreements that might harm or affect the trade between member states or the competition which would consequently harm society and consumers' welfare. "All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States, and which have as their object and effect the prevention, restriction or distortion of competition within the common market…".[8] Article 101(1) TFEU is considered to be an early recognition from the EU that consumers can be indirectly harmed by actions that harm the competitive structure of the market.[9] Also, this recognition is continued these days, as mentioned recently in *GlaxoSmithKline Services Unlimited v Commission*.[10]

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[4] Neelie Kroes, Former European Commissioner for Competition Policy, (Speech in London, October 2005), <www.ec/europa/eu/competition>, Last accessed, Dec 07-2020.

[5] Katie Cseres, 'The Controversies of Consumer Welfare Standard' (2007) 3(2) Competition Law Review 121, 173.

[6] Law Commission, *Communication from the Commission Notice Guidelines on the Application of article 8 (3) of the Treaty* (101, 2004) p97.

[7] Greening washing Machines (CECEDI) Commission Decision 2000/475/EC [1999] OJL 187/47.

[8] The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:(a) directly or indirectly fix purchase or selling prices or any other trading conditions;(b) limit or control production, markets, technical development, or investment;(c) share markets or sources of supply;(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[9] *Europemballage and Continental Can v Commission* [1973] Case 6/72, ECR 215, CMLR.

[10] The provisions of paragraph 1 may, however, be declared inapplicable in the case of:- any agreement or category of agreements between undertakings,- any decision or category of decisions by associations of undertakings,- any concerted practice or category of concerted practices, which contributes to improving the

In addition, the TFEU prevention of any agreements that might distort competition within the market could reflect another EU competition goal which is seeking to perfect competition in the market. "…So, the commission is mindful that what really matters is protecting an effective competitive process…".[11] The perfect competition could be achieved through lower prices, better products quality, which lead to higher economic efficiency. According to the neo-classical economic theory, social welfare including the customer welfare is maximized in the perfect competition condition.[12] Also, in order to achieve social welfare as one of the competition laws goals, both allocative and productive efficiency are required to reach the maximization of society's' welfare. The allocative efficiency means that all the goods and services are allocated between consumers according to the price they are prepared to pay, and on the long run, the price will equal the marginal cost. Also, allocative efficiency is better achieved under perfect competition as both the producers and consumers will benefit in such conditions. The producer will be able to expand production if it will be profitable to him/her. For example, if the producer could earn more through the production of extra units of the product, he will produce more in case the profit is more than the cost. On the opposed hand, the producer will cease to expand the production in cases where producing extra unit costs him more than the profit. Under perfect competition economy, such a reduction in the item's productivity is not going to affect the market price and the producer will increase the output in order to reach the equation of concurring the marginal cost and marginal avenue. Added to that, the consumer will be able to obtain the goods and services at the price they are ready and able to pay. In contrast, if there is no perfect competition, a monopolist producer could increase the marginal revenue and restrict the output, which is against the social and consumer welfare goal. The productive efficiency is achieved when the producer could not be able to raise the price of the product item; if he charged above the cost and under perfect competition, other competitors would move into the market to gain profitable activities. In addition, producers will improve the products to be more efficient to get more profit, which is a benefit to the consumers, as they will gain better product quality with lower prices.

The anti-competitive agreement

There are two types of agreements: vertical and the horizontal agreements. The vertical agreement is an agreement between two or more undertakings on different levels, such as agreements between distributor and supplier of raw materials. "Vertical agreement means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services".[13] The horizontal agreement is an agreement between two competitors on the same level, such as two manufacturers of the same product. For example, Nokia and Samsung.

Also, the agreements could be anti-competitive by object or by effect and both are prohibited under EU Competition Law. "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market".[14] The more important part of this discussion is the anti-competitive agreements by object, as the price-fixing agreements are a by object constraint. The anti-competitive by object agreement is recognised through the content of the provisions

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production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

[11] Law Commission, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* (OJ 45, 2007), 7.

[12] FM Scherer and David Roses, *Industrial Market Structure and Economic Performance* (3rd ed, Boston Houghton Mifflin 1990).

[13] Commission regulation (EU) 330/2010, Art 1(a).

[14] TFEU, Art 101(1).

of the agreement and the intention is not considered to be one of the determinative factors. "Objective is determined objectively and not subjectively".[15]

The price fixing agreements are strictly prohibited under art.101(1) TFEU as a by object constraint.[16] Also, the price fixing agreement has an effect on the competitive structure of the market, which is one of the two criteria that have been determined by CJEU. The CJEU, in the *Consten and Grundig v. Commission* case and *T Mobile* case,[17] clarified that the prohibited activity in the agreement should affect the trade between the member states such as changing the competitive structure of the market, and the price fixing agreement restricts the competition obviously with no need for more analysis as it is anti-competitive agreement by object. "Where an agreement has as its object the restriction of competition it is not necessary to prove actual anticompetitive effects".[18]

Further, there are some legal exceptions where provisions of paragraph one would not be applicable. The exceptions were stated in Art. 101(3), Such as, if the anti-competitive agreement could lead to economic and technical enhancing. "The provisions of paragraph (1) may, however, be declared inapplicable in the case of: any agreement or category of agreements between undertakings, which contributes to improving the production or distribution of goods or to promoting technical or economic progress".[19] This exception could be applied to the anti-competitive agreements by object, as occurred in *CECED* case.[20] The agreement between producers of washing machines to promote the production of energy efficiency was considered an anti-competitive agreement by object. However, it was accepted that the agreement leads to benefits for both the consumers and the environment and was justified under Article 101(3) TFEU. The EU commission, the national competition authorities and the national courts have the power to apply Art. 101(3) if there is a need.[21] Also, the party who seeks exemption, carries the burden of proof.

Abuse of dominance

Abuse of dominance is prohibited under Art. (102) TFEU where the abuse of dominance aspects is stated clearly. One of these aspects is excessive pricing, which is strictly prohibited under art. 102(a).[22] In addition, existing case law is considered as a guideline of how excessive pricing is treated under the EU Competition Law. For instance, in the *British Leyland case*, the Commission found that the vehicle manufacturer had charged excessive prices for certificates for left and right-handed cars; despite the fact that the costs of inspections were the same.[23]

Added to that, there are five elements of abuse of dominance conduct. The first element is the conduct must be between one or more undertakings. Secondly, a dominant position (in the relevant market). Thirdly, this dominant position must be held within the internal market or a substantial part of it. Fourthly, an abuse must occur. Fifthly, an effect on interstate trade must happen as a result of the

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[15] *Commission v Beef Industry Development Society* [BIDS] [2018] Case C 209/07.
[16] TFEU , Art 101 (1), stated that: "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:(a) directly or indirectly fix purchase or selling prices or any other trading conditions".
[17] *Grundig v. Commission* [1996] ECR 301, 342 Case C-8/08
And *T- Mobile* [2009] ECR 1-04529.
[18] Richard Whish and David Bailey, *Competition Law* (8th ed, University Press 2015) para 30.
[19] TFEU, art 101 (3).
[20] *CECED* [1999] Case IV.F.1.
[21] EU Regulation 1/2003, Art 3(1).
[22] TFEU , Art 102 stated that: "An abuse by one or more undertakings of a dominant position within the internal market or its substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between member states."
[23] *Commission V British Leyland* [1984] Case 226/84.

abuse.[24] The undertaking "encompasses every entity engaged in an economic activity."[25] Also, the dominant position is related to the power of the undertaking in a specific market, and this dominance must be within the internal market or a substantial part of it. The CJEU determined the substantial part of the market as "'the pattern and volume of the production and consumption of the product as well as the habits and economic opportunities of vendors and purchasers must be considered".[26] In addition, the market is defined under competition law from two sides: the demand and supply sides. The demand substitution is a qualitative criterion based on a measure for determining substitutability through the SSNIP test.[27] The CJEU held that "In finding a dominant position, it is unnecessary that products be completely interchangeable ..."[28] The other side of the market definition is the supply substitution. The supply substitution is relevant when the supplier possesses the ability to switch the products in a short term without incurring any significant costs or risk.[29]

Egyptian Competition Law regime, authorities, and goals.

Egyptian Competition Law was enacted in 2005, Law No. 3 of 2005 Promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices. Egypt faced both external and internal pressure to enact its competition law. Firstly, the external pressure was a result of the economic reform in the middle of the 1990s. This reform led to the economy privatization, rather than state economy and the Egyptian economic policy had emphasized the role of the private sector.[30] The main reason behind the privatization is attracting foreign direct investments (FDI). In fact, the trade between Egypt and EU increased, which led to signing the General Cooperation Agreement with Egypt in 1997 for preferential trade relation between Egypt and EU.[31] However, this agreement did not include any competition rules. Then, the Barcelona process had started by 1995, and took five years to be signed and ratified by both parties.[32] The main aim of the Barcelona process was to adopt free trade between EU and Mediterranean neighbours by 2010. In addition, serious negotiations were held through the Barcelona process resulting in many agreements, which Egypt was one of; for instance, EMAA "European Mediterranean Association Agreement". The EMAA agreement was signed and came into force, and one of its main provisions is a five-year requirement of Egypt to implement its obligations: one of the obligations is to enact its competition law; and based on this obligatory provision, Egypt published its own Competition Law.

Second, Egypt faced other internal pressures. One was based on Article two of the Egyptian constitution, which stated that "Islam is one of the legislation sources and the principles of the Islamic sharia are the major source of legislation".[33] It was argued that the Egyptian Government faced internal religious pressure, as the monopoly is strictly prohibited under the Islamic Shariaa. However, this is considered as a weak argument, as this religious pressure is found since the 1923 Egyptian Constitution:

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[24] TFEU , Art 102 stated that: "An abuse by one or more undertakings of a dominant position within the internal market or its substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between member states."
[25] *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] Case C-67/96.
[26] *Suiker Unie v Commission* [1975] C 40/73.
[27] A hypothetical monopolist test, which is known as "SSNIP test". The test examines the percentage of customers who would switch their purchases to other products or supplier after a price increase. The SSNIP test takes the 5-10 per cent range of switching customers to indicates the significance required with the test.
[28] *NV Nederlandsche Banden Industrie Michelin V Commission* [1983] Case 332/81.
[29] Law Commission, *Commission Notice on market Definition* (1997) Paras 20-23.
[30]See Egyptian Competition Authority "Free market", available at: http://www.eca.org.eg/ECA/StaticContent/View.aspx?ID=13 (last accessed 07-12-2020).
[31] At this particular stage, only a few numbers of agreements contained competition provisions in a manner that simply promotes fair competition practices. See for example, the Association Agreement between the European Economic Community [now EU] and Cyprus, 19th December 1972, O.J. L133/2, 21st May 1973.
[32] Ratification by EU parliament on 29th of Nov 2001 and on the 7th of April 2003 by Egyptian Parliament.
[33] The Egyptian Constitution, Art 2, amended according to the result of the plebiscite on the constitutional amendment that was conducted on May 22, 1980.

"Islam is the religious of the state".[34] Another internal pressure was the domestic economic conditions after privatization. The privatization was the main aim of the economic reforms and structural adjustment program, which was led by both the International Monetary Fund (IMF) and the World Bank.[35] The Economic privatisation was a challenge faced by Egypt, as the regulatory structure during the state control era does not match with the privatization stage. This led to transferring the monopoly from state monopoly to private monopoly and resulted in increasing the number of the Anti-competitive allegations with a lack of competition law.[36]

The ECL "Egyptian Competition Law" is applied on "natural and juristic persons, economic entities, unions, financial associations and groupings, groups of persons, whatever their means of incorporation..."[37] Also, it is applied internally and externally on the committed acts that might harm the freedom of competition in Egypt.[38] Any Competition Law case starts through the ECA, "the Egyptian Competition authority". ECA is the authority for the protection of competition and the prohibition of monopolistic practices and is established according to the ECL.[39] The ECL is located in Cairo, Egypt with no physical location and it has public juristic personality. "The Authority shall be located in Cairo and shall have the public juristic personality".[40] It is managed by a board of directors.[41] The ECL is an autonomous body and is affiliated to the prime minister and his delegator, the minister of trade and industry.[42] The main reason of the affiliation to the minster is based on the notion of minister responsibility before the parliament, which was stated in Art. 124 of the Egyptian Constitution.[43] Further, ECA should report its annual report to the minister and communicate it to the parliament and Shura council.[44]However, the minister does not acquire the right to amend or ask for the annual report amendment before the submission to parliament or the Shura Council, and the ECA does not need a minister prior approval to the annual report.

The ECA substantive powers are stated clearly under Art.11 of the ECL. Such as, setting up data, organizing trainings and educational programs.[45] The ECA regulates the protection of competition and the prohibition of monopolistic practices and this could occur through initiating the cases with or without complaint.[46] Without receiving complaint it has the right to start procedures of inquiry, inspections and fact findings on its own initiative.[47] If the information or the documents required to be submitted under competition law were incomplete, the ECA has the right to decline reviewing the complaint. However, if the ECA considers that the complaint is complete, it has to review it and conduct

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[34] The Egyptian Constitution 1923, Art 149.
[35] Over the medium term, a decentralized market based outward-oriented economy where private sector activity will be encouraged by a free, competitive, and stable environment with autonomy from government intervention. International Monetary Fund, (1991) "*Arab Republic of Egypt-Recent Economic Developments*" as cited by El-Dean and Mohieldin (2001), *op.cit.*, p.22-23)
[36] A.F Ghoneim, Competition Law and Competition Policy: What does Egypt really Need? (2002) Submitted for the ERF 9th Annual Conference < http://www.erf.org.eg/9th%20annual%20conf/9th%20PDF%20Background/Trade/T-B%20Ahmed%20Ghoneim.pdf) accessed 23-01-2008 >.
[37] The Egyptian Competition Law, Art 2.
[38] The Egyptian Competition Law, Art 5.
[39] The Egyptian Competition Law, Art 2(3) stated that: "ECL The Authority for the Protection of Competition and the Prohibition of Monopolistic Practices established in accordance with the provisions of this Law."
[40] The Egyptian Competition Law, Art 11.
[41] The Egyptian Competition Law, Art 12, which stated that: "The Authority shall be managed by a Board of Directors the composition of which shall be formulated by virtue of a decree of the Competent Minister".
[42] The Preamble of The Egyptian Competition Law, Art 2 which stated that: "The Prime Minister is the minister competent to give effect to the provisions of this Law."
[43] The Egyptian Constitution 1923, Art 124, which stated that: "only the prime minister, his deputies, the minsters, their deputies are responsible before the parliament".
[44] The Egyptian Competition Law, Art 11(9).
[45] The Egyptian Competition Law, Art 11
[46] The Egyptian Competition Law, Art 11.
[47] The Executive Regulation of the Egyptian Competition Law, Art 33.

the necessary inspection, inquiry and fact-finding related thereto.[48] The ECA has the right, with the majority of its board members, to issue administrative decisions that determine that a competition law violation incurred. The ECA has that right independently from the government. Further, the ECA's decisions are binding and cannot be repealed by the government and decisions can only be appealed before the administrative court. If the ECA issued an administrative decision, it refers it to the prosecutor's office and an investigation will be initiated. Then, if a violation is proved, the prosecution procedures initiate before the Economic Criminal Court. The Economic Criminal Courts were established in May 2008 through the Egyptian parliament agreement to introduce the Law no. 120 of 2008. They are responsible for settling any disputes resulting from the protection of competition law and any other monopolistic practices.[49] The economic courts can impose the criminal penalties on competition law violators, and not the ECA, as the penalties can only be imposed through the final decision of the economic court.[50] The economic criminal courts have the exclusive jurisdiction to penalize and fine the violators.[51]

The main goal of the ECL is consumer welfare. The current dominant approach in Egypt is protecting the consumer which, was stated clearly in the Egyptian Constitution amendments as one of the main Competition Law goals. "The economic system is committed to the criteria of transparency and governance, supporting competitiveness … achieving balanced growth; preventing monopolistic practices …; and achieving balance between the interests of different parties … to protect consumers".[52] In addition, consumer welfare is a priority under the ECL, as Art (1) of the law No 3 of 2005 stated that the economic activities should not be an obstacle to the freedom of competition that might harm the consumer and society welfare. "Economic activities shall be undertaken in a manner that does not prevent, restrict or harm the freedom of competition in accordance with the provisions of the Law".[53] Also, the ECA in its annual report 2006-2007 stated that "Competition is not a goal in itself but rather a means for making markets work better for consumers".[54]

The price fixing agreement under Egyptian competition law

Price fixing agreements are strictly prohibited under Egyptian Competition law. As Article Art 6 of the law No.3 ,2005 stated that: "Agreements or contracts between competing persons in any relevant market are prohibited if they are intended to cause any of the following: (a) Increasing, decreasing or fixing prices of sale or purchase of products subject matter of dealings".[55] In addition, It was mentioned in the COMESA" Common Market for Eastern and Southern Africa".[56] The COMESA treaty stated that: "the Member States agree to prohibit any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Common Market.".[57] Although, there is no doubt that the price fixing agreement is prohibited under the Egyptian competition Law, the Egyptian legislator specified some legal exceptions to price fixing agreements. The first exemption is related to the society and consumer welfare and the second exemption is a state or government exemption.

First, in 2014, the ECL (Egyptian Competition Law) was amended to introduce a pre-exemption mechanism to cartel agreements in case an agreement leads to achieving economic efficiency, provided that the benefits to the consumer outweigh the restriction of competition. Article 9 of the Law No.3,

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[48] The Executive Regulation of the Egyptian Competition Law, Art 37.
[49] The Egyptian Law Establishing the Economic Courts Law no. 120, 2008, Art 4.
[50] IBID.
[51] OECD, Competition Committee, 16-18 June 2015, Para 19.
[52] The Amended Egyptian Constitution 2014, Art 27.
[53] The Egyptian Constitution Law, Art 1.
[54] The Egyptian Competition Authority Annual Report, 2006-2007.
[55] The Egyptian Competition Law, Art 6.
[56] Egypt is a member of the COMESA; it is regional body and the activities in Egypt should be conducted with COMESA. Also, both COMESA and ECA engage regularly on variable transactions and investigations).
[57] COMESA, Art 55(1).

2005 also exempted price fixing agreements if they lead to consumer welfare and if the benefits to the consumers are more than the competition restrictions "…. Where this is in the public interest or for attaining benefits to the consumers that exceed the effects of restricting the freedom of competition…"[58] This exemption is based on the concerned parties' request and has to be ratified by the ECA. Also, this exemption is related to the public utilities managed by private companies who are subject to the private law. "The Authority may, upon the request of the concerned parties, exempt some or all the acts provided for in articles 6, 7 and 8 regarding public utilities that are managed by companies subject to the Private Law…"[59] Added to that, the price fixing agreement exemption procedures should be applied in accordance with the executive regulation of this law. "… This shall be done in accordance with the regulations and procedures set out by the Executive Regulation of this Law".[60]

Further, if the economic activity in the agreement seeks to improve production and distribution of goods, enabling the consumer for share of benefits, or promoting technical or economic progress, this price agreement will be exempted from being an Anti-competitive agreement. As stated in Art 55(2) of the COMESA treaty, "The provisions of paragraph 1 of this Article is inapplicable in the case of: (a) any agreement or category thereof between undertakings; (b) any decision by association of undertakings; (c) any concerted practice or category thereof; which improves production or distribution of goods or promotes technical or economic progress and has the effect of enabling consumers a fair share of the benefits."[61] However, this exemption has a condition to be applicable, which is the agreement should not impose any restrictions against achieving the COMESA treaty objectives or affect the competition negatively. "Provided that the agreement, decision or practice does not impose on the undertaking restrictions inconsistent with the attainment of the objectives of this Treaty or has the effect of eliminating competition".[62] Further, it is mentioned that, the authorised entity with the price fixing agreement exemption is the council. Article 55(2) of the COMESA clarified that: "The Council may declare the provisions of paragraph 1 of this Article inapplicable".[63]

Secondly, public utilities managed by the state are totally exempted from the application of Article 6 of Law No. 3, 2005, which prohibits anti-competitive agreements. It might be argued that this exemption is considered to be against ECA independence, as the ECA has no authority on the state agreements related to the public utilities and also the competition law is not applied on the public utilities managed by the state. "The provisions of this Law shall not apply to public utilities managed by the State".[64] Further, the Law gives the Cabinet of Ministers the right to fix the prices of essential products for a period of time without any powers of the ECA to reject the Cabinet of Ministers decree to do so; and the only condition imposed on the cabinet of minister is to take the opinion of the ECA before issuing the decree and not the ECA permission. "The Cabinet of Ministers may, after taking the opinion of the Authority, issue a decree determining the selling price for one or more essential products for a specific period of time".[65]

The law gave the government uncontrolled permission for the price fixing agreements related to the essential products, because the government is allowed to execute any agreement to implement the essential products price fixing without any interference or control from the ECA, or any other authorities. Further, these agreements by the government are not considered to be anti-competitive agreements. "Any agreement concluded by the government for the purpose of the implementation of these prices shall not be considered anti-competitive practice."[66] This is despite the fact that the price of two essential products in Egypt increased in the period between 2006-2009, which are the meat and

[58] The Egyptian Competition Law, Art 9.
[59] Ibid.
[60] Ibid.
[61] COMESA, art 55(2).
[62] Ibid.
[63] Ibid.
[64] The Egyptian Competition Law, Art 9.
[65] The Egyptian Competition Law, Art 10.
[66] Ibid.

the cement. Although, the council of minister of cabinet did not use the price fixing exception under Art (10), it might be argued that the reason behind not using Art (10) is that, it is incompatible with Art (10) of the Law No. 8/1997 for investment guarantees and incentives. Art (10) prohibited any authority from interfering in the pricing of the company's products or profits. "No administrative authority shall interfere in respect to the pricing of a company's or establishment's products, nor in determining their profit".[67]

In comparison with EU competition Law, there are some similarities between both EU and Egyptian competition Law provisions that are concerned with the exceptions of the price fixing agreements. Firstly, the EU exempt the price fixing agreement if the agreement aims at social welfare through allowing consumers a fair share of resulting benefits of the agreement, or the agreement lead to goods or distribution of goods improving, or if the agreement aims at promoting technical or economic progress. "The provisions of paragraph 1 may, however, be declared inapplicable in the case of: any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings or any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit .."[68] Secondly, the TFEU inserted a condition to apply the exception of price fixing agreement. The exempted price fixing agreement should not impose any restrictions against the treaty objectives or impact competition. "…and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".[69] Finally, it is obvious that the COMESA competition provision structure is modelled on the European competition provision related to the anti-competitive agreements.

The excessive pricing and the abuse of dominance under the Egyptian Competition Law

Excessive pricing is considered to be one of the major obstacles to market efficiency. The ECA former chairperson in her annual report 2006-2007 stated that "the increase in prices has become a major problem in the marketplace".[70] The excessive pricing is one of the abuses of dominance aspects, and in order to analyse whether it is prohibited under the ECL, we will discuss the dominance determination, the abuse of dominance, and finally, the main differences between excessive pricing and abuse of dominance.

Firstly, the dominant positions in Egypt is not prohibited in itself. However, the dominant firms are prohibited from certain conduct, which is considered as an abuse of dominance. Also, the Egyptian legislator defined the dominance clearly as : "Dominance in a relevant market is the ability of a person, holding a market share exceeding 25 per cent of the aforementioned market, to have an effective impact on prices or on the volume of supply on it, without his competitors having the ability to limit it".[71] There are specific criteria to classify a firm as a dominant firm under Egyptian competition Law. "Dominance provides the existence of three elements. First, the person must hold a market share of more than 25 per cent of the relevant market for a certain period of time. Second, the person should have the ability to influence prices or volume of products supplied in that market, and third, the inability of competitors to restrict his or her influence on prices or volume of these products".[72] It was stated in Art 4 of the ECL that more procedures would be added through the executive regulation of this law regarding dominance determination. "The Authority shall determine the situations of dominance according to the procedures provided for in the Executive Regulations of this Law.[73] For example, Art 8 of the executive

[67] The Law No. 8/1997 for Investment Guarantees and incentives, Art 10.
[68] TFEU, Art 101 (3).
[69] Ibid.
[70] The Egyptian Competition Authority Annual report, 2006-2007.
[71] The Egyptian Competition Law, Art 4.
[72] The Executive Regulation of the Egyptian Competition Law, Art 7.
[73] The Egyptian Competition Law, Art 4.

regulation added to the ability of the person in a relevant market to influence the product's price or volume. "The person shall have effective impact on the prices of the products or the quantity supplied in the relevant market if this person has the ability, through his/her individual acts, to determine the prices of these products or the quantity supplied in that market where his/her competitors do not have the ability to prevent these acts".[74] In order to consider the firm as dominant under Egyptian Competition Law, all the pre-requisites have to be satisfied. For instance, in the steel study, Ezz group hold over 25 per cent of the relevant market. However, it did not reach a dominance finding except after the analysis of all other perquisites.

Second, in contrast with Article 102 TFEU, the list of abuses stipulated under Article 8 of the ECL are exhaustive.[75] The Egyptian legislator prohibited the dominant firms from specific conduct which is considered as abuse of dominance. These conducts are stated clearly as nine conducts under Art 8 of the ECL. Firstly, any undertaking leads to a product non-manufacturing, non-production or non-distribution for a specific period of time. Secondly, refraining or dealing with a person in a manner restricting his freedom from entering or existing the market at any time. Thirdly, any act limiting the distribution of a product. Fourthly, to impose any obligations or products not related to the original transaction or agreement. Fifthly, price discrimination between sellers or buyers. Sixthly, refusing the production or providing of a scare product. Seventhly, dictating restrictions on the utilities or services. Eighthly, selling a product under their marginal cost. Ninthly, restricting a supplier from dealing with a competitor.[76] This means that any other abuse of dominance practice not stated clearly in this article is not prohibited. However, it might be argued that excessive pricing is caught under art 8(e), which prohibits any transaction which has any price discrimination between sellers or buyers. "Discriminating between sellers or buyers having similar commercial positions in respect of sale or purchase prices or in the terms of the transaction".[77] However, this practice refers to the firm which charge different prices to its customers, which is different from the excessive pricing abuse that means selling the products with high prices to all customers due to an abusive practice. In 2014, the ECA received a complaint about *Telecom Egypt* for its abusive practices. *Telecom Egypt* is one of the telecommunications dominant companies in the Egyptian market. *Telecom Egypt* breached Art 8(e) of the Law No 3, 2005 through the discriminatory treatment which harmed its competitors at the downstream level. This ended by issuing administrative orders. In addition to that, there are other cases related to abuse of dominance but not related to the excessive pricing, which is evidence that it is not prohibited under the Egyptian

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[74] The Executive Regulation of the Egyptian Competition Law, Art 8.

[75] Interview with Dr Khaled Attia, Former Executive Director, Egyptian Competition Authority (Egypt, 29 April 2010).

[76] The Egyptian Competition Law, Art 8 stated that: "A Person holding a dominant position in a relevant market is prohibited from carrying out any of the following:
a) Undertaking an act that leads to the non-manufacturing, or non-production or the non-distribution of a product for a certain period or certain periods of time.
b) Refraining to enter into sale or purchase transactions regarding a product with any Person or totally ceasing to deal with him in a manner that results in restricting that Person's freedom to access or exit the market at any time.
c) Undertaking an act that limits distribution of a specific product, on the basis of geographic areas, distribution centres, clients, seasons or periods of time among Persons with vertical relationships.
d) To impose as a condition, for the conclusion of a sale or purchase contract or agreement of a product, the acceptance of obligations or products unrelated by their very nature or by commercial custom to the original transaction or agreement.
e) Discriminating between sellers or buyers having similar commercial positions in respect of sale or purchase prices or in the terms of the transaction.
f) Refusing to produce or provide a product that is circumstantially scarce when its production or provision is economically possible.
g) Dictating on Persons dealing with him not to permit a competing person to have access to their utilities or services, despite this being economically viable.
h) Selling products below their marginal cost or average variable cost.
I) obliging a supplier not to deal with a competitor".

[77] The Egyptian Competition Law, Art 8(e).

Competition Law. For instance, in January 2018, the economic criminal court of Cairo imposed a 4000 EGP million fine on *BeIn sports* as a result of infringing article 8 (d) and (g).

Another argument is that excessive pricing is prohibited under Art 13 (b) which prohibited from entry into a sale or purchase of a product with any other person or restricting dealing with him in a manner lead to restricting that person freedom. "Refraining from entry into sale or purchase transaction regarding a product with any person or totally ceasing to deal with it in a manner that results in restricting that person's freedom to access or exit the market at any time, which includes imposing financial conditions or obligations or abusive contractual conditions or conditions that are unusual in the activity subject matter of dealings".[78] However, the prohibition under article 13(b) is limited with the upper stream market such as, the producers, suppliers and distributors and is not related to the customer. In addition, the prohibition is related to refraining from the entry into the agreement, which means that there is no agreement yet. On the other hand, excessive pricing conduct is dealing with high prices already offered and imposed on the customers. Finally, if the excessive pricing is prohibited under Egyptian competition law, the Egyptian legislator would add the excessive pricing as one of conducts which are considered as an abuse of dominance under the Law, or refer to it in the executive regulations. However, such prohibition was not mentioned in any of them.

In contrast with the Egyptian Competition Law, excessive pricing is prohibited under EU competition law. The excessive pricing prohibition was stated clearly in the TFEU: Art 102 (a) prohibited the dominant firm from selling with unfair high prices. "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions".[79] In addition, excessive pricing is also prohibited under the case Law, although, there are only a few cases of excessive pricing abuse at the EU. However, clear guidance of how the excessive pricing was treated are found. For example, the *United Brand Case,* which is considered the leading case of the excessive pricing. The *United Brands* is a well- established bananas firm, and the Commission found that *United Brands* abused its dominant position through excessive pricing.[80]

Where the price fixing exemption did not affect the consumer welfare goal

Egypt has achieved one of its main competition goals, which is the improvement of the Egyptian competition cultural goal as Egypt has shifted from simple cartels to complex abuse of market dominance. For example, in the telecommunications and broadcasting sector.[81]Further, the publication of the ECA decisions on any violation or breach of the competition Law has improved the competition culture.

One of the biggest cartels related to the price fixing is the *Cement* case.[82] The ECA examined the Cement producer's practices between 2002-2006 based on price fixing conduct. During the price war (1999- 2003), the cement price went very low and the companies agreed to retain the price level to the 1999 price under the government supervision and before issuing the Egyptian Competition Law. However, the government role in the cement case was just supervisory and ended by 2005. The ECA found that the producers breached Article 6 (a) of the Egyptian Competition Law. The cement case is the first judicial precedent, and the violators were fined 200 million EGP. A further example is the

[78] The Executive Regulation of the Egyptian Competition Law, Art 13(6).
[79] TFEU, Art 102(a).
[80] *United Brands Company V Commission* [1978] ECR 207, Case 27/76.
[81] For example, "COMESA Competition Commission investigates football broadcasting rights" (28 February 2017), available at: <https://africanantitrust.com/2017/02/28/comesa-competition-commission-investigates-anti-competitive-restrictive-practices.>, Last accessed 07-Dec 2020.
[82] *Public Prosecution v National Cement Co & Others,* Court of First Instance [2008], Nasr City Case 2900/2008.

glucose case cartel as price fixing agreement and breaching of Art 6 (a), the cartel occurred between 2008- 2012 is one of the biggest cartels investigated by the ECA.[83]

In addition, the price fixing exemption did not harm the achieving of the consumer welfare goal in Egypt, even though the price fixing agreement is an anticompetitive agreement and prohibited under Art (6) (a) of the Egyptian Competition Law.[84] There is an exception related to the essential products pricing, and the Cabinet of Ministers, after considering the ECA's opinion, may issue a decree determining the selling price for one or more essential products for a specific period of time.[85] Further, the ECA shall assist the Cabinet of Ministers in determining the sale price of the essential products by conducting the necessary studies.[86] The legislator failed to identify what are the essential products, which gives the government wider authority and power than the ECA, as the ECA role related to determining the essential products' price is recommendatory only. The prices of some essential products such as cement and red meat have increased from 2006-2009. However, all the studies conducted by the ECA about these products' prices, mentioned that the minister's cabinet did not use the exception of article 10. Thus, the price fixing exception did not harm the consumer welfare as one of the main Egyptian Competition Law goals.

The non-prohibition of the excessive pricing harmed the consumer welfare goal

As mentioned above, the ECL did not prohibit excessive pricing which caused a negative impact on achieving the consumer welfare goal because the non-prohibition of the excessive pricing under the ECL resulted in giving the dominant firms more opportunities to set the prices excessively. We will now discuss the impact of the excessive pricing in both primary and secondary markets, the relation between market structure and excessive pricing, and the dominant firms' welfare as a result of excessive pricing instead of consumer welfare through analysing the steel industry in Egypt as an example.

First, excessive pricing might have two aspects, the excessive pricing in the primary market and the excessive pricing in the secondary market. The excessive pricing in the primary market, where the prices of the main products are high. The products of the primary market are complementary to the secondary market's products, which means that any increase in the prices of the primary market would affect the prices of the secondary market, such as concrete and raw materials. If the concrete is excessively priced, the construction firms might be affected, and the small and medium sized firms would be harmed. Also, excessive pricing in the primary market not only harms the firms, it also harms the consumer which will face higher prices in the secondary market products, as final products they purchase. In addition, excessive pricing in the secondary market refers to the aftermarkets that includes services and goods directly offered to the consumer, such as cars, so the excessive pricing in the secondary market products directly harm the consumers and are considered to be against the consumer welfare as a competition goal. In conclusion, the pricing over competitive level in both primary and secondary markets cause detriment to the consumer welfare,[87]which could be seen in the Egyptian market. For example, the red meat prices, which is an essential product and its excessive pricing harmed the consumers which is a clear violation of the consumer welfare goal.

Secondly, it was argued that there is a relation between the market structure and excessive pricing. If the market is highly concentrated it increases the excessive pricing chances. As per Harvard schools' proponents, there is a relation between the market concentration and high prices. This study approach is called (SCP), the structure, conduct and performance. They argued that the structure of the market

[83] OECD, Directorate for financial and enterprises affairs competition committee, p3.
[84] The Egyptian Competition Law, Art 6 (a).
[85] The Egyptian Competition Law, Art 10.
[86] The Egyptian Competition Law, Art 13.
[87] Damien Geradin, 'The Perils of Antitrust Proliferation – The Process of 'Decentralized Globalization' and the Risks of Over- Regulation of Competitive Behavior' (2009) Chicago Journal of International Law <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1327688>, last accessed 05 Dec 2020.

refers to its players' conduct which identifies the performance.[88] Also, they mentioned that high market concertation and high entry barriers harm consumer welfare directly, as the consumers welfare is achieved through low-priced and quality products. As mentioned earlier, the Egyptian market is highly concentrated. For example, few firms have a 70 per cent market share of the Egyptian fabric production market. The non-prohibition of the excessive pricing allows these dominant firms to excessively increase the prices, which lead to dominant firm's welfare instead of consumer welfare, discussed in the following paragraph.

Thirdly, excessive pricing deters consumer welfare and might lead to dominant firms' welfare instead of consumer welfare. The objective of the competition law is to protect consumer from the anti-competitive practices by the dominant firms and that could not happen through excessive pricing. As a result of the non-prohibition of excessive pricing in Egypt, consumer welfare was harmed and a very popular example is the steel industry in Egypt.

By the beginning of the economy privatization in the 1990s, the governmental control over the steel industry ended and it is now controlled by Ezz Steel Rebars (ESR), who has 28 per cent share of Alexandria National Iron and Steel Company in Dikhela (ANSDK), which is a government controlled company. Both companies are operating under the name "Ezz Dekhela" steel (EZDK), and its chairman is Ahmed Ezz. EZDK now hold 54 per cent of the steel market share, which evidences that it is dominant firm. The rest of the steel market industry is divided between public sector companies such as, Helwan Steel, which holds 7 per cent of the market, and private sector firms such as Suez Steel and others with about 26 per cent of the steel market share.

There are some factors facilitating excessive pricing in the steel industry by EZDK. First, the billet monopoly by Ahmed Ezz. Egyptian steel relies mainly on the rebars and these rebars require billet in order to be produced. As a result, all the EZDK competitors import raw materials, however, EZDK does not have to, as they run fully integrated plants. Also, the government imposed high tariffs on importing steel as a form of protection and encouraging the domestic steel industry, which increased the EZDK market power and after media pressure the tariff declined to 5 per cent. In addition, the high level of entry barriers in the steel industry in Egypt increased the chances of excessive pricing, mainly since 2000. As the production level increased the consumption level caused weak demand. The production in 2002 was 6.4 million tons in comparison with 5.6 million tons in 2001. The main reason behind the low demand is the downturn of the real estate market, which relies and is based on rebar (the Egyptian construction is different from that in the UK as they use mainly rebar, steel, iron).[89] Steel is an essential product in Egypt as many industries are based on steel, for example car manufacturing and the construction industry. The excessive pricing of steel in Egypt harmed the society and consumer welfare on all levels, starting from the medium sized firms and ending by the labour working in a construction industry.

Conclusion

Egypt is one of the early adopters of Competition Law in the developing countries. Also, Egypt faced both internal and external pressures to issue its Competition Law, a result of the economic reform and the privatization in 1991, and the external pressure was based on the trade relation between Egypt and EU. Egyptian Competition Law was influenced by EU Competition Law in many respects. However, the Egyptian legislator stated an exemption related to the price fixing agreement that allows the Cabinet of Ministers to fix the price of the essential product for a specific period, while considering the ECA's opinion. Although Egypt faced high prices related to some essential products such as red meat, there was no evidence that it is based on the price fixing agreement exemption under Art (10) of the Law No. 3, 2005, and this exemption has never been used. Thus, the price fixing agreement exemption did not

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[88] Jonathan Faull and Ali Nikpay, *The Economics of Competition: The EC Law on Competition* (2nd ed, OUP 2007).

[89] Available at https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/SC (2020)1/FINAL&docLanguage=En. Last accessed 05 Dec 2020.

harm the consumer and it is not considered as an obstacle to achieve its consumer welfare goal. In addition, the Egyptian legislator did not prohibit excessive pricing under the ECL, which gives the dominant firms the right to price the products excessively. As a result, non-prohibition of the excessive pricing harmed the consumer welfare goal and lead to dominant firm welfare instead of the consumer welfare.

RECENT DEVELOPMENTS

HUMAN RIGHTS

Dangerous prisoners and attacks on fellow prisoners

Dr Steve Foster*

Introduction

In a recent decision of the High Court,[1] the Ministry of Justice was found in breach of its common law and European Convention obligations to keep a prisoner reasonably safe, where he had been attacked by another prisoner and had suffered serious injuries because of the attack. This resulted in the prisoner being awarded £85,000 in general damages, including interest, and the court also made a declaration that the prisoner's right to be free from inhuman and degrading treatment, guaranteed under Article 3 of the European Convention on Human Rights 1950, had been breached. Such legal claims are not novel, although many are settled out of court, but they raise a number of legal and moral claims surrounding the question of whether prisons, and the government, should be responsible for such attacks, and in what circumstances, and whether prisoners should, morally, be able to make such claims and receive compensation from the public purse.

This piece details this recent court case, but more broadly, it will revisit the legal issues raised in such claims, including the principles of human rights, public authority accountability and the rule of law employed to justify awards in the face of criticisms from the public against such awards.

The decision in *Newell v Ministry of Justice*

In this case, the claimant prisoner, Newell, brought a claim in common law negligence and under the Human Rights Act 1998 against the defendant, for breach of his Article 3 rights under the European Convention.[2] Newell was a convicted murderer and had been serving a whole life term, and on 27 November 2014 Vinter, another whole-life term prisoner, attacked him whilst they were in the exercise yard at a prison. Because of the attack, Newell suffered significant injuries, including brain damage and the loss of sight in his right eye.

Importantly, Vinter had a history of violent and disruptive behaviour whilst in prison and was recorded by the prison as a high risk of harm to other prisoners in custody.[3] At the prison, there was a system of unlock levels in place: a single unlock was imposed where a prisoner's risk to others was considered too high to enable him to participate in mixed association or mixed activities, and unlock level three meant that three prison officers would be required safely to unlock a prisoner from his cell. A Dynamic Risk Assessment (DRAM) had been carried out on Vinter on 26 November, and it had been recorded

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[1] *Newell v Ministry of Justice* [2021] EWHC 810 (QB)

[2] Article 3 provides that no one shall be subject to torture or to inhuman or degrading treatment or punishment.

[3] *This prisoner had been at the heart of another legal dilemma facing prisoners' rights: of whether the imposition of a whole life sentence amounted to inhuman and degrading treatment under Article 3 ECHR: Vinter v United Kingdom (2016) 63 EHRR 1. See Steve Foster, 'Whole life sentences and article 3 of the European Convention on Human Rights: time for certainty and a common approach? (2015) 36(2) Liverpool Law Review 147.*

that he was unsettled because of a delay in his transfer to another prison, and that there was an opportunity for him to assault another prisoner in his association group in the exercise yard.

Newell sought damages and a declaration of the breach of his Article 3 ECHR rights for the alleged failure by the Ministry to prevent him from being harmed by others in custody, specifically Vinter. The substantive issues for the Court were: whether on the facts, the Ministry had kept Newell reasonably safe, and, if not, the causal consequences of that failure; and whether there had been a breach of the operational duty under Article 3 ECHR by the Ministry. However, for the Article 3 claim to proceed, the other issue for the court was whether Newell should be granted an extension of time under s.7(5)(b) of the Human Rights Act 1998 to bring a claim under Article 3 ECHR,[4] as it had been issued after the expiry of the time limit prescribed by the Act. The final issue was the quantum of damages, if Newell's claim was successful.

Giving judgment for the claimant, the court first considered whether that had been a breach of the Ministry's duty of care towards the claimant. In this respect, the court noted that the decision at the 26 November DRAM to allow Vinter to associate with Newell was in breach of the Ministry's duty of care. This was because the risk on 26 November was high, and that the effect of maintaining the three officer unlock meant that Vinter's opportunity to use the violence that he was well known for, would have arisen in the exercise yard when he was with other prisoners in his association group; the prison officers being locked outside the yard. Thus, on 26 November, there was a failure to consider the opportunity that presented to Vinter, and in the court's view, had it been discussed, the conclusion that should have been reached was to take steps to remove Vinter's association with other prisoners. Thus, if Vinter had been placed on a single unlock on 26 November, the attack would not have occurred.[5]

With respect to the claim under Article 3 ECHR, the court first had to consider the issue of extension of time and whether it was proportionate and fair to both parties to allow Newell's Article 3 case to proceed. The court stated that here was no evidence of the steps taken by N until the claim form was issued, but that for some months Newell had been suffering from significant cognitive dysfunction because of his brain injury and in addition was in prison, which provided a justification for some delay. The time limit in s.7(5)(b) of the 1998 Act expired on 27 November 2015, and the claim form was issued eight months later. That delay, in issuing the claim form, was, in the court's view, relatively modest and the defendant had been on notice at around 10 months after expiry of the limitation period following a request for disclosure. The court bore in mind that the memories of the Ministry's witnesses would have faded to some extent, but considered that the documentation available to the defendant had not been materially affected by any such delay. It concluded, therefore, that the cogency of the evidence had not been affected to the extent that there was any significant prejudice to the Ministry's ability to defend the claim. Newell had a good claim under Article 3 ECHR, and the delay in the context of a claim for a declaration and damages was relatively short. The necessary burden had been discharged and the time would be extended to permit his claim to be brought.[6]

Having ruled in favour of the claimant with respect to the delay issue, the court proceeded to deal with the substantive claim under Article 3 ECHR**.** In the court's view, there would be a breach of the positive obligation under Article 3 where the authorities knew or ought to have known at the time, of the existence of a real and immediate risk of a breach of Article 3 of an identified individual or individuals from the acts of a third party, and failed to take measures within the scope of their powers, which, judged reasonably, might have been expected to avoid that risk. In the present case, the risk posed by Vinter was a present and continuing one, was immediate, and became so on 26 November. As a result of the failure to appreciate that, reasonable steps had not been taken, and if they had been, the attack on

[4] The section provides as follows: (5) Proceedings under subsection (1)(a) must be brought before the end of— (a) the period of one year beginning with the date on which the act complained of took place; or (b) *such longer period as the court or tribunal considers equitable having regard to all the circumstances,…*
[5] At paras 82-83 of judgment).
[6] At paras 91, 94 of the judgment

27 November would have been avoided. The claim of a breach of Article 3 had, thus, been established and the court granted a declaration that that Article had been breached.

Finally, with respect to the quantum of damages, the court felt that the appropriate award was £85,000 for general damages, with approximately £7,400 interest.[7]

Human rights claims of prisoners for attacks by fellow prisoners

Awarding compensation to prisoners for attacks from fellow prisoners is hugely controversial, and a previous article in this journal reported the outrage from the media and politicians in response to a £4,500 damages award given to Levi Bellfield, the convicted murderer of teenager Millie Dowler, for an attack on him by fellow prisoners in 2010.[8] The Ministry of Justice was reported as saying that it was "hugely disappointed" by that decision and Labour MP Ian Austin described the pay out as "a complete and utter disgrace.''[9] In such cases, it is argued that to allow awards to those convicted of serious criminal offences makes a mockery of justice.[10] In particular, the general public response has been that individuals such as Bellfield and Newell, should not be allowed to use the courts to vindicate their rights when by the very nature of his crime they have violated others' rights. In other words, that it is morally wrong, and should be legally impossible, for them to bring such an action.[11] In the Bellafied case, further criticism was directed at the fact that the taxpayer had to pay the compensation and the resultant costs, which were estimated at approximately £10,000.[12]

These concerns and arguments are part of a wider debate about the forfeiture of prisoners' rights: the popular opinion being that prisoners should forgo many of their rights on imprisonment. Nevertheless, the legal position – under both domestic law and under the European Convention on Human Rights – is that prisoners retain their basic rights, subject to them being taken away, expressly or by necessary implication.[13]

Under both domestic and human rights law, prisoners may and do bring actions in private law against the prison authorities.[14] In addition, following the coming into effect of the Human Rights Act 1998, courts, as public bodies under s.6 of the Act, have the duty to apply such private law principles in the light of the European Convention whenever the claimant's Convention rights are engaged.[15]

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[7] At paras 108, 110.

[8] Steve Foster, 'Compensating prisoners for attacks by fellow prisoners' (2014) 2 Coventry Law Journal 18. See 'Why should monsters like Levi Bellfield have human rights when they are not human?' *The Daily Mirror* April 4 2014. Bellfield had been attacked by a fellow prisoner with a makeshift weapon outside one of the prison's bathrooms in 2009 before he went on trial for the murder of the 13-year-old schoolchild. B launched a legal action in negligence claiming that the prison staff should have protected him; arguing that he should not have been placed within the prison's main population because the nature and notoriety of his murders made him a target. Bellfield, a former wheel clamper and bouncer, was already serving a whole life term, imposed in 2008 for the 2003 murder of Marsha McDonnell, 19, and the 2004 murder of Amelie Delagrange, 22, and attempted murder of Kate Sheedy, 18.

[9] Milly Dowler's killer Levi Bellfield awarded £4,500 over prison attack' *The Daily Telegraph,* April 4 2014,

[10] Similar outrage was vented in 2010 when Ian Huntley - the person convicted of the 'Soham murders' involving the deaths of two young girls in 2003 - brought an action to sue the government in negligence when he was assaulted by a fellow prisoner. See 'Soham killer Ian Huntley to get 20k pay out for having throat slashed in prison' *The Daily Record*, 23 March 2010

[11] See Steve Foster, 'Compensation for assaults by fellow prisoners and the rule of law' (2010) 174 (41) Criminal Law and Justice Weekly 631

[12] 'Durham County Court hears murderer Levi Compensation bid' *Daily Chronicle,* 5 April 2014 It is reported that he will also receive £171 in interest as the payout has been back-dated to 2009; the time of the assault.

[13] See *Golder v United Kingdom* (1975) 1 EHRR 524; *Raymond v Honey* [1980] AC 1.

[14] For a general account see Livingstone and Owen, *Prison Law* (Oxford University Press) 3rd edition, 53-76

[15] Alternatively, the prisoner may bring a direct action against the prison authorities under s.7 of the Human Rights Act for breach of his or her Convention rights. This will be discussed, later.

Prisoner's private law claims in negligence in the domestic courts

In *Ellis v Home Office*,[16] it was established that the Prison Service owed a duty to take reasonable care for the safety of prisoners in their custody. The claimant, a remand prisoner, had been attacked by a convicted prisoner and brought an action against the Home Office. He sought to discover documents relating to the convicted prisoner and his mental capacity, but the prison authorities successfully relied on Crown Privilege (now Public Interest Immunity). Although the court accepted that the claimant was owed a duty of care, it found that there was no breach of that duty on the facts. The case highlights the difficulty of uncovering essential and sensitive information that is in the hands of public authorities, although in the post-Human Rights Act era it appears that the courts will provide greater protection, applying article 6 of the European Convention which guarantees the right to a fair trial and, in particular, the right to equality of arms.[17]

Nevertheless, Ellis established that the prison authorities owe a duty of care towards prisoners in respect of attacks by fellow prisoners. In these cases, the courts must judge whether the prisoner in question was owed such a duty and whether the duty was broken in all the circumstances, although early case law showed that the courts were reluctant to find liability on the facts in the absence of a clear breach of duty. For example in *Palmer v Home Office*,[18] it was held that the Home Office was not liable in a case where the plaintiff had been attacked with a pair of scissors by a prisoner with a very violent criminal and prison record. The scissors had been given to the prisoner when he was allocated tailoring work in the workshop. It was held that although it was foreseeable that the prisoner might attack a fellow prisoner, the prison authorities had a twofold duty; one to ensure the safety of fellow prisoner, and the other to provide all prisoners with a constructive working regime. The prison authorities had to balance the protection of prisoners with their duty to provide other prisoners with suitable employment and that in that respect they were reluctant to interfere with the prison's judgment in this case. This reluctance seemed to be based on the idea that prisoners would inevitably be under threat from fellow prisoners and that in the absence of clear evidence that the assault was foreseeable and avoidable no liability would be established.

On the other hand, the courts have always been more prepared to attach liability in relation to the actions of prison officials where the authorities are in breach of their own procedures. Thus in *Burt v Home Office*,[19] it was held that the prison authorities had been negligent when a vulnerable prisoner was attacked by other prisoners while being escorted from a segregation unit through the general prison. In finding the Home Office liable, the court noted that the officers involved had walked in front of the prisoner, instead, as required in such cases, behind him, and had chosen not to take a more secure route. Indeed, in the present case, the court relied heavily on the prison's procedures and its failure to act on the clear warning signs in not removing Vinter from normal association.

As evidenced from cases such as *Palmer*, above, a major obstacle for prisoners in negligence actions is the judicial recognition of the fact that prisoners are inherently dangerous places and that the standard of care expected from the defendant authorities has to be judged, and reduced, accordingly.[20] Further, the courts have recognised that the prison authorities may balance their duty of care to ensure prisoner safety with other duties such as the rehabilitation and training of potentially dangerous fellow prisoners. Thus, in *Thomas v Home Office,*[21] a youth offender institute had not been negligent in adopting a policy of supplying razors to inmates. The claimant had been the subject of an unprovoked attack and had suffered severe injuries and at first instance it was held that the authorities were liable in negligence, even though the claimant had given no information on the identity of the assailant. However, the Court

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[16] [1953] 2 QB 135.
[17] *Rowe and others v Fryers and others* [2003] EWHC Civ 655
[18] *The Guardian*, 31 March 1988.
[19] Unreported, decision of Norwich County Court 27 June 1995
[20] There is, of course, a strong argument for imposing a *greater* and *stricter* liability on the prison authorities for that reason.
[21] [2001] EWCA CIV 331 CA

of Appeal held that that neither the policy nor its adoption in this particular case provided evidence of the Home Office's negligence. In the Court's view, prison governors, particularly those in charge of Young Offender Institutions, have to make balancing judgments between tight security and a regime aimed at rehabilitation in which inmates are given the power to act responsibly.[22] The decision, therefore, adopts the approach taken in cases such as Palmer, and leaves to the authorities a very wide discretion as to how they protect inmates from clearly foreseeable attacks. [23]

In the present case however, the court specifically took into account the dangerousness of the other prisoner in finding liability. Vinter was a notoriously dangerous prisoner and Newell needed special protection against him, and this was not a case where the claimant prisoner was in general danger from other prisoners in the dangerous environment of a prison. Indeed, this allowed the claimant to avoid the other obstacle in these cases, that the authorities must be able to foresee the attack to a required degree. In Orange v Chief Constable of West Yorkshire Police,[24] the Court of Appeal stressed that prison or police authorities would not be responsible for harm occasioned to their charges simply because they had failed to follow the required procedures. Thus, to be liable in negligence the authorities would have to owe the prisoner an initial duty of care, and would not be responsible merely because the prisoner suffered damage because of their negligent act or omission. In Orange, the Court of Appeal dismissed a claim in negligence when a detainee had committed suicide after the prison authorities had broken their lock-in procedures. This was because the suicide was still not foreseeable, and that decision was consistent with the case law of the European Convention under article 2 of the European Convention, which requires a real and immediate risk to life. In the present case, however, Vinter was a clear and immediate risk, and the authorities would have known of this specific risk.

Attacks on prisoners and the European Convention on Human Rights

In addition to bringing a civil action against the authorities, a prisoner can also use Articles 2 (right to life) and 3 (prohibition of inhuman and degrading treatment and punishment) of the European Convention as an alternative action, or to augment the civil action. Thus, ECHR rights can both be used to protect an inmate's right to life and physical integrity, not only from the acts of public officials, but also the actions of fellow inmates. This is because prison authorities owe a positive duty under articles 2 and 3 to ensure that they take reasonable measures to safeguard every inmate's right to life.[25]

As well as bringing claims before the European Court, prisoners may be able to use the Human Rights Act 1998 to bring proceedings in respect of neglect on behalf of the authorities a number of ways; both evident in the present case. First, s.6 of the Act makes it an offence for a public authority to violate Convention rights, and s.7 of the Act allows the victim of such a violation to bring proceedings against such authorities. If such neglect, therefore, engages the prisoner's Convention rights – most notably under articles 2 and 3 of the Convention (the right to life and freedom from inhuman and degrading treatment) – then that prisoner may bring a direct action under the Act and seek, inter alia, compensation under s.8 of the Act, which allows the courts to award 'just satisfaction.'[26] Secondly, a prisoner may use the Act when he brings a private action, and as the term 'public authority' used in s.6 of the Act includes a court, there will be duty on the courts to ensure that an individual's Convention rights are not violated.[27] Thus, the courts have a duty to develop and apply the common law in a manner that is

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[22] Ibid, at para 25
[23] See also *Stenning v Home Office* [2002] EWCA Civ 793
[24] [2001] 3 WLR 736
[25] Under the principles laid down in *Osman v United Kingdom* (1998) 29 EHRR 245.
[26] This principle is borrowed from Article 41 of the European Convention on Human Rights, which allows the European Court to award such remedy when it finds a violation of the Convention.
[27] For debate on the horizontal effect of the Human Rights Act, see Hunt, 'The 'Horizontal' Effect of the Human Rights Act' [1998] PL 423, and Wade, 'Horizons of Horizontality' (2000) 116 LQR 217. For a discussion on the effect of the Act on tort law, see Buxton, 'The Human Rights Act and Private Law' (2000) 116 LQR 48, and Wright, *Tort Law and Human Rights* (Hart 2001).

consistent with the European Convention,[28] and in actions in negligence, the courts must have regard to the Convention and its case law in determining whether the prison authorities had broken their duty of care, and in determining the extent of any remedy.

This duty is not absolute and even in the post-Human Rights Act era the domestic courts have taken a guarded approach, bestowing on the authorities a reasonably wide margin of discretion in assessing the actual risk to the prisoner. Thus, in *R (Bloggs) v Secretary of State for the Home Department*,[29] the Court of Appeal found that the Prison Service's decision to remove the prisoner from a protected witness unit and return him to mainstream prison system was not in violation of the prisoner's right to respect for life under article 2 of the European Convention. In the Court's view, there had been a substantial reduction of risk to the prisoner's life once the authorities had decided not to prosecute the person who posed the threat to the prisoner.

Nevertheless, under article 2, prison authorities are responsible for protecting the prisoner from threats to his life from the actions of others, such as fellow prisoners[30] and a clear violation of this duty was found in *Edwards v United Kingdom*,[31] a case with some similarities to the present one. In this case, the applicant's son had been killed by his cellmate who had a history of violent outburts and assaults, and who had been diagnosed as schizophrenic. The emergency buzzer in the cell was malfunctioning and by the time officers heard a disturbance and went to investigate, the applicant's son had been stamped and kicked to death by his cellmate. In finding a violation, the European Court found that the cellmate posed a real and serious risk to the applicant's son and that the prison authorities had not been properly informed of the cellmate's medical history and perceived dangerousness. The cellmate should not have been placed in the cell in the first place and the inadequate screening process disclosed a breach of the State's obligation to protect the life of the applicants' son.[32]

In the present case, therefore, the prison authorities clearly saw the risk to the claimant prisoner. They were aware of the specific dangerousness of Vinter, and his specific risk to all prisoners, including Newell, should he remain in normal association. This knowledge, and failure to act accordingly resulted in a breach of the common law and the prison's duty under Articles 2 and 3 ECHR, and the compensation award reflects this; the domestic courts having to reflect the European Court's approach to just satisfaction in such cases.

Conclusions

Prisoners are especially vulnerable to the neglect of prison authorities, and in particular to dangers such as attacks from fellow inmates. As in many other legal areas, the Human Rights Act 1998 increases the potential for legal actions brought by prisoners in respect of negligent mistreatment received whilst in detention. The domestic courts and the Strasbourg Court have adopted a cautious approach with respect to claims brought by prisoners alleging a breach of the authority's duty of care, being careful not to impose an impossible burden on state agents to protect the lives and physical integrity of those in detention. In cases involving attacks by fellow prisoners, the courts accept that prisons are inherently dangerous places, although in the present case the dangerousness of the attacker, combined with a clear and specific risk will attract liability.

Whether the likes of Newell should receive compensation for attacks by fellow prisoners is obviously an emotive one. It is tempting to suggest that such prisoners deserve all they get and that they should

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[28] For example, in an action for assault brought by a prisoner against the prison authorities, or against the officer in person, the courts could have regard to Article 3 of the European Convention in deciding whether the force used on the prisoner was lawful or reasonable so as to found an action in assault. See *McCotter and Russell v Home Office*, *Daily Telegraph*, 13 March 2001.
[29] *The Times* July 4 2003.
[30] See *X v FRG* (1985) 7 EHRR 152 and *Rebai v France* 88-B DR 72.
[31] (2002) 35 EHRR 19
[32] At para 64. The Court also found a breach of the State's obligation under article 2 to hold a proper inquiry into a potentially unlawful death.

be denied the protection of the law and the right to claim compensation (from the public purse) when they have been attacked by fellow prisoners. The inescapable fact is, however, that the courts must and need to rule on these cases. Allowing prisoners to sue in such cases, is essential in upholding basic legal and human rights which are available to all, including prisoners. It is also basic to fundamental notions of justice; based both on common law principles and the content of human rights treaties such as the European Convention on Human Rights, now enshrined in our domestic law by the Human Rights Act 1998. Further, the ability to bring such actions provides the opportunity to call public authorities to account in the performance of their public and legal duties. It is without question that the state and all public authorities owe a duty of care towards everyone, including, and perhaps, especially, those in their custody.

As we have seen, the law does not accept that prisoners can sue in every case where they have been attacked: the attack needs to be foreseeable and the law, including international; law, does not impose a disproportionate and unreasonable duty on the state. Newell is, therefore an exceptional case, albeit in the context of a commonplace event in prisons.

Covid in the courts: challenges to lockdown measures in the United Kingdom

Dr Ben Stanford*

Introduction

The COVID-19 global pandemic has undoubtedly been one of the most challenging episodes in recent human history, impacting virtually all aspects of life and states worldwide to a greater or lesser extent.[1] In that respect, in September 2020, the United Nations General Assembly passed an omnibus resolution calling the crisis 'one of the greatest global challenges in the history of the United Nations'.[2] As of 21 July 2021, the World Health Organization revealed that there have been 191,148,056 confirmed cases of COVID-19 worldwide, including 4,109,303 deaths reported by states, with the United Kingdom accounting for over 5 and a half million confirmed cases and almost 130,000 deaths.[3] Whilst obviously presenting itself initially as an enormous public health crisis, the pandemic has also raised massive social, political and legal issues as lockdown, physical distancing and various surveillance measures have restricted the freedoms and liberties of individuals.

Following this introduction, the second section sets out the legal framework in the UK which has proven particularly complex for several reasons, not least of all due to changing strategic approaches and easing of restriction measures, as well as the nature of the disease itself which has rapidly evolved over the past 18 months, and also the nature of devolution leading to some divergence in how the nations of the UK have responded. The third section then provides an overview of the most significant legal challenges heard in the UK since the beginning of the pandemic, with the majority of judgments showing a degree of judicial deference to the Government to tackle the public health crisis. The final section concludes and looks to future developments.

The legal instruments

In the United Kingdom, a large number of legal instruments have been steadily implemented across the past 18 months in response to the crisis.[4] However, the legal framework governing lockdown measures and restrictions in the UK is complex for a number of reasons. The COVID-19 pandemic rapidly escalated in early 2020 and has surged again in several 'waves' since, amidst changing strategic responses and the easing of lockdown measures. At the same time, the emergence of new, more infectious variants has also presented further challenges.[5] These factors have necessitated new measures and regular amendments to existing legislation.

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[1] See Ben Stanford, Steve Foster and Carlos Espaliú Berdud (eds), *Global Pandemic, Security and Human Rights: Comparative Explorations of COVID-19 and the Law* (forthcoming Routledge 2021); Luo Li, Steve Foster, Carlos Espaliú Berdud and Ben Stanford, *Global Pandemic, Technology and Business: Comparative Explorations of COVID-19 and the Law* (forthcoming Routledge 2021).

[2] UN General Assembly, 'Omnibus Resolution Comprehensive and Coordinated Response to the COVID-19 Pandemic' UN Doc. A/74/L.92 (11 September 2020) para 1.

[3] World Health Organization, WHO Coronavirus Disease (COVID-19) Dashboard <https://covid19.who.int/?gclid=Cj0KCQiA9P__BRC0ARIsAEZ6irjWNIw-8nn2-MNzFFl2vmcr4V8lrrKhillD_D1UOa2gmTzJJ-Y4juEaAvXjEALw_wcB> accessed 22 July 2021.

[4] For a comprehensive and accessible breakdown of UK lockdown laws, see Sarah Barber, Jennifer Brown and Daniel Ferguson, 'Coronavirus: Lockdown Laws' *House of Commons Library No. 8875* (10 June 2021).

[5] Public Health England, Research and Analysis: Variants: Distribution of Cases Data (last updated 16 July 2021) <https://www.gov.uk/government/publications/covid-19-variants-genomically-confirmed-case-numbers/variants-distribution-of-cases-data> accessed 22 July 2021.

Additionally, the legislative authority for the implementation of delegated legislation to impose lockdown restrictions, in the form of statutory instruments made by Government Ministers, has come from two principal sources – first, the Public Health (Control of Disease) Act 1984, and second, the Coronavirus Act 2020 – adding a layer of complexity. Powers contained in the former Act have generally been used to implement lockdown restrictions regulations in England and Wales, whereas in Scotland and Northern Ireland, powers in the latter Act have generally been used. Moreover, as health and social care are devolved matters, the issue of devolution has also further complicated the matter with the various nations of the United Kingdom sometimes implementing different levels of restrictions at different times.[6] In what follows, for practical reasons only the most significant historic and currently in force legislative provisions in the four nations will be set out.

England

Beginning with England, the Health Protection (Coronavirus) Regulations 2020 were implemented on 10 February 2020,[7] as a statutory instrument pursuant to the Public Health (Control of Disease) Act 1984. This instrument was limited in scope and mostly concerned initial isolation and screening measures when the pandemic first came to the UK's shores. It was then revoked and replaced on 25 March 2020 by fast-tracked primary legislation in the form of the Coronavirus Act 2020. This Act, applicable in all four nations of the UK to some extent depending on the particular provisions, conferred significant powers upon Government Ministers to take swift action to combat the spread of the virus. Shortly prior to the Act, the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 were implemented on 21 March 2020 to enforce the closure of indoor premises selling food and drink, and other leisure and hospitality establishments.[8]

These measures were then followed by the more well-known Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 on 26 March 2020,[9] commonly referred to as the 'Lockdown Regulations' for containing the most serious restrictions of the initial enforced lockdown. These were later revoked and replaced on 4 July 2020 by the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 which allowed some easing of restrictions.[10]

For some months after, attempts were made to impose targeted 'localised' lockdowns in response to spiking infection rates, initially in Leicester,[11] and then in other areas of England such as Luton, Blackburn, Bradford and then much of Northern England.[12] However, in October 2020, this localised approach was abandoned and replaced by a series of so-called tiered restrictions, made possible through three further Regulations.[13] Nevertheless, with the second wave of the pandemic taking hold and worsening in November 2020, a more general 'lockdown' system was once again implemented on 3 November 2020 by the Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations

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[6] See Akash Paun et al, 'Coronavirus and devolution' *Institute for Government* (last updated 1 July 2020) at https://www.instituteforgovernment.org.uk/explainers/coronavirus-and-devolution accessed 22 July 2021.
[7] SI 2020/129.
[8] Also made pursuant to the Public Health (Control of Disease) Act 1984. Revoked and replaced by the more extensive 'Lockdown Regulations' (SI 2020/350) below.
[9] SI 2020/350.
[10] SI 2020/684.
[11] The Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020 (SI 2020/685).
[12] See for example, The Health Protection (Coronavirus, Restrictions) (Blackburn with Darwen and Luton) Regulations 2020 (SI 2020/800); The Health Protection (Coronavirus, Restrictions) (Blackburn with Darwen and Bradford) Regulations 2020 (SI 2020/822); The Health Protection (Coronavirus, Restrictions on Gatherings) (North of England) Regulations 2020 (SI 2020/828).
[13] 'Tier 1': The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020 (SI 2020/1103); 'Tier 2': The Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) Regulations 2020 (SI 2020/1104); 'Tier 3': The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020 (SI 2020/1105).

2020.[14] Shortly before the Christmas period, a tiered system of restrictions returned via the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020.[15]

Finally, these Regulations were replaced by the Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021 which came into force on 29 March 2021.[16] These Regulations have gradually phased out the most significant restrictions in three steps, subject to some limitations of group size such as weddings, civil partnership receptions and funerals. On 19 July 2021, England moved to the final stage, Step 4, whereby most remaining legal restrictions were removed, including the legal requirement to wear face coverings.

Scotland

In Scotland, the UK-wide Coronavirus Act 2020 was swiftly followed by the Coronavirus (Scotland) Act 2020, enacted by the Scottish Parliament on 6 April 2020. This Act addressed some of the pre-existing statutory requirements placed upon public services in Scotland, which had become particularly onerous at the onset of the crisis, such as the regulations imposed upon the NHS, jury trials and tenants facing eviction. This was followed by the Coronavirus (Scotland) (No.2) Act 2020 on 27 May 2020 which made further reforms to tenancy agreements, care homes and the justice system, amongst others, to enable public services to continue functioning during the crisis. Certain provisions of both Acts have been extended on several occasions via a series of Regulations, whilst some provisions have been allowed to expire.[17] Further powers are contained in the Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Regulations 2020, made on 28 August 2020,[18] which allow public authorities to give directions concerning specific premises, events or public outdoor places such as closing or restricting access to premises.

Similar to England, the most serious lockdown restrictions in Scotland to enforce social distancing measures and impose restrictions on gatherings, events and business activities were implemented by means of a statutory instrument. The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 were made on 26 March 2020,[19] pursuant to the powers conferred upon the Scottish Government by the Coronavirus Act 2020. These Regulations were eventually replaced on 14 September 2020 by the Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020,[20] which were in turn replaced on 9 October 2020 by the Health Protection (Coronavirus) Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Regulations 2020.[21]

The current restrictions in Scotland are governed by the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 which came into force on 5 January 2021.[22] These Regulations introduced a five-tiered system of restrictions and have been amended on numerous occasions to allow for the gradual easing of lockdown measures in Scotland. In contrast to England and Wales, which have generally applied nationwide measures, these Regulations have applied localised measures and significant differences have come into effect across the different regions of

[14] SI 2020/1200 as amended.
[15] SI 2020/1374 as amended.
[16] SI 2021/364 as amended. This was revoked by The Health Protection (Coronavirus, Restrictions) (Steps etc.) (England) (Revocation and Amendment) Regulations 2021 (SI 2021/848).
[17] The Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2020 (SSI 2020/249); The Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2020 (SSI 2020/299), the Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2021 (SSI 2021/152).
[18] SSI 2020/262.
[19] SSI 2020/103 as amended.
[20] SSI 2020/279 as amended.
[21] SSI 2020/318 as amended.
[22] SSI 2020/344 as amended.

Scotland.[23] On 19 July 2021, however, all of Scotland was moved to Level 0 restrictions, with a view to removing all remaining major restrictions on 9 August 2021 if certain conditions are met.

Wales

In Wales, powers in the UK-wide Coronavirus Act 2020 were given effect to by the Coronavirus Act 2020 (Commencement No. 1) (Wales) Regulations 2020 which were made on 26 March 2020.[24] These Regulations, similar to the two Coronavirus (Scotland) Acts, alleviated some of the pressures placed upon Welsh public authorities caused by their pre-existing statutory duties.

As with England and Scotland, the most significant lockdown restrictions to enforce social distancing measures and impose restrictions on gatherings, events and business activities were made by statutory instrument.[25] The Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, made pursuant to powers in the Public Health (Control of Disease) Act 1984, came into force on 26 March 2020.[26] These Regulations were replaced the Health Protection (Coronavirus Restrictions) (No.2) (Wales) Regulations 2020,[27] which mostly came into force on 11 July 2020, which were in turn replaced by the Health Protection (Coronavirus Restrictions) (No. 3) (Wales) Regulations 2020,[28] coming into force on 23 October 2020. These were replaced by the Health Protection (Coronavirus Restrictions) (No. 4) (Wales) Regulations 2020,[29] coming into force on 9 November 2020.

The current restrictions in Wales are governed by the Health Protection (Coronavirus Restrictions) (No. 5) (Wales) Regulations 2020 and are due to expire by 27 August 2021.[30] These Regulations, similar to those implemented recently in England, implement levels or a 'steps' approach to the phased easing of restrictions. At the time of writing, all of Wales is subject to Alert Level One, which presents the lowest level of restrictions, with a view to moving to Alert Level Zero on 7 August 2021.

Northern Ireland

As with the other nations of the United Kingdom, the most significant lockdown restrictions to enforce social distancing measures and impose restrictions on gatherings, events and business activities were made by statutory rules.[31] Similar to Scotland, the initial and most significant restrictions were enacted pursuant to powers conferred upon the devolved administrations by the Coronavirus Act 2020, in the form of the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 which took effect on 28 March 2020.[32] These Regulations enforced the closures of premises and imposed restrictions on gatherings and were revoked and replaced by the Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020, taking effect on 23 July 2020.[33] The current restrictions in Northern Ireland are governed by the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2021 which came into effect on 9 April 2021,[34] with a view to easing restrictions on 26 July 2021.

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23 See Scottish Government, 'Coronavirus (COVID-19) protection levels: What you can do' (last updated 19 July 2021) at https://www.gov.scot/publications/coronavirus-covid-19-protection-levels/ accessed 22 July 2021.
24 SI 2020/366 (W 81).
25 For the full list of Regulations applicable in Wales, see Welsh Government, Coronavirus legislation: Restrictions on individuals, business and others (last updated 16 July 2021) at https://gov.wales/coronavirus-legislation-restrictions-individuals-business-and-others accessed 22 July 2021.
26 SI 2020/353 (W 80) as amended.
27 SI 2020/725 (W 162) as amended.
28 SI 2020/1149 (W 261) as amended.
29 SI 2020/1219 (W 276) as amended.
30 SI 2020/1609 (W 335) as amended.
31 These are formally known as Statutory Rules rather than Statutory Instruments but perform the same function.
32 SR 2020/55 as amended. The powers were formally conferred by the Public Health Act (Northern Ireland) 1967, as amended by the Coronavirus Act 2020.
33 SR 2020/150 as amended.
34 SR 2021/93 as amended.

An overview of the legal challenges

The complexity and duration of the lockdown measures set out above have significantly restricted basic freedoms and liberties for people across the United Kingdom to some extent for almost 18 months. Thus, it is not surprising that the various Governments across the nations have faced numerous legal challenges throughout the course of the pandemic. What follows is not intended to be an exhaustive account of these challenges, but a brief account and reflection over some of the most significant, most of which have had very limited success. Owing to what most generally accept to be a genuine public health crisis necessitating tough restrictions, the courts have generally shown a deferential approach to Government, thus conferring a significant margin of discretion in the making and enforcement of lockdown and physical distancing measures. That being said, the impact and proportionality of restrictions has been seriously considered in some cases.

Even prior to the implementation of the formal lockdown regulations, on 25 March 2020 the Court of Protection in England had to consider the best interests of an 83-year-old man suffering from Alzheimer's where his care home had suspended all family visits in the wake of the pandemic. In *BP v Surrey CC*,[35] the Court strangely applied Article 15 of the European Convention on Human Rights (ECHR), which permits derogations from certain human rights obligations in times of emergency, despite there being no formal derogation from the British Government. Mr Justice Hayden found that the restrictions to the applicant's right to liberty (Article 5) and privacy and family life (Article 8) were justified by the crisis and the implementation of alternative means of family communication. This was a particularly awkward decision due to the absence of a formal derogation announcement from the British Government at the time, or even since the beginning of the pandemic.

Another legal challenge that pre-dated the formal lockdown regulations also came in March 2020 concerning immigration detention and the impact of COVID-19 upon detainees. In *R (Detention Action) v Secretary of State for the Home Department*,[36] the charity 'Detention Action' sought interim relief via judicial review, seeking the release of detainees with particular medical conditions who were thus placed at greater risk to the pandemic. Relying upon the right to life (Article 2) and the prohibition of torture and inhuman and degrading treatment (Article 3) of the ECHR, the charity challenged their detention and especially those with increased vulnerability to the pandemic, and the absence of an effective system for protecting detainees in the pandemic more generally. The High Court rejected the plea, pointing to the fact that the Home Office had already released several hundred detainees during the pandemic and was taking 'sensible, practical and precautionary steps to address the possible effect of the COVID-19 pandemic in immigration detention centres'. In particular, it was stressed that it was the role of the court to assess the legality of the secretary of state's actions, not to second-guess legitimate operational choices.[37]

Following the introduction of the formal lockdown regulations across the four UK nations at the end of March 2020, set out earlier in this article, one of the earliest and most significant challenges to the Regulations in England came in May 2020 in *R (Hussain) v Secretary of State for Health and Social Care*.[38] In this case, the applicant relied upon the freedom of thought, conscience and religion (Article 9) of the ECHR to seek interim relief in respect of the enforced closure of places of worship contained in the so-called Lockdown Regulations.[39] Mr Justice Swift refused the application, finding that the interference with Article 9 was not disproportionate and the closure of places of worship was rationally connected to the objective of protecting public health. Moreover, the Court concluded that the Health Secretary was allowed a suitable margin of appreciation in deciding the order in which to lift restrictions. The question was whether the decisions, in so far as they interfered with ECHR rights,

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[35] *BP v Surrey CC* [2020] EWCOP 17.
[36] *R (Detention Action and another) v Secretary of State for the Home Department* [2020] EWHC 732 (Admin).
[37] ibid paras 17-20, 22-25 and 27.
[38] *R (Hussain) v Secretary of State for Health and Social* Care [2020] EWHC 1392 (Admin).
[39] See above, SI 2020/350.

struck a fair balance with societal interests, and the Secretary had been entitled to adopt a cautionary stance.[40]

In contrast, however, a successful and more recent legal challenge on a similar issue arose in Scotland concerning the continuation of Lockdown Regulations. In *Philip v Scottish Ministers*,[41] Christian church leaders challenged via judicial review the Regulations applicable at the time in Scotland concerning the enforced closure of places of worship.[42] The petitioners argued that the Scottish Government did not have the constitutional power at common law to restrict the right to worship in Scotland, and that the closure of places of worship was an unjustified infringement of their rights to manifest their religious beliefs and to assemble with others, as guaranteed by Articles 9 and 11 of the ECHR respectively. The Court of Session held that the Regulations constituted a disproportionate interference with the right to manifest religious beliefs pursuant to Article 9 of the ECHR, and thus the Scottish Ministers had acted *ultra vires* by imposing the enforced closure of religious premises.

Care home settings have been particularly hard hit by the effects of the pandemic. In that respect a challenge was brought in June 2020 in England by an individual, Dr Cathy Gardner, against the Department for Health and Social Care, NHS England and Public Health England following the death of her father to the virus. The claimant argued that certain policies and decisions were to blame for the significant death toll in care homes in violation of several human rights, namely the right to life (Article 2), the prohibition of torture, inhuman and degrading treatment (Article 3), the right to respect for privacy and family life (Article 8), and the prohibition of discrimination (Article 14) of the ECHR. In November 2020, Mr Justice Linden gave permission for a full hearing,[43] and after several months of delay the trial is now set to begin on 19 October 2021.

Restrictions in education settings have also attracted significant legal challenges. Arguably, the most significant challenge to the general Lockdown Regulations came in England in July 2020 in *Dolan and others v Secretary of State for Health and Social Care*.[44] This involved an application to the High Court for judicial review of the legality of the initial Lockdown Regulations in England,[45] and the decision to stop providing education on school premises. The claimants argued *inter alia* that the Regulations had been issued *ultra vires*, that the Health Secretary had acted irrationally in making them, and that he had acted disproportionately by not terminating them. The claimants also raised objections on human rights grounds, arguing *inter alia* that the restrictions on movement, gatherings and the closure of places of worship breached various ECHR rights. Mr Justice Lewis rejected the application, finding that the Regulations were lawful, that some of the grounds for complaint were merely academic following the amendment of the Regulations, and that there was no remedy of any practical purpose in respect of school closures given the Government's subsequent pledge to re-open them in September 2020. The case was subsequently appealed to the Court of Appeal, which granted the application in part, but dismissed the claim on its merits.[46] The Court of Appeal held that the Health Secretary had not acted *ultra vires* by making the Regulations, that the other public law grounds for challenge were flawed or unarguable, and finally that the various human rights arguments put forward were flawed, unarguable or merely academic given the subsequent developments.

In Wales, residential visits and overnight stays which are essential for school trips remained subject to restrictions until July 2021, in contrast to England and Scotland which eased restrictions earlier in May 2021. In June 2021, whilst the ban was still in force, one such centre in Wales – the Rhos y Gwaliau

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[40] [2020] EWHC 1392 (Admin) Swift J, paras 24-25.
[41] *Philip v Scottish Ministers* [2021] CSOH 32.
[42] Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No 11) Regulations 2021 (SSI 2021/3).
[43] BBC News, 'Covid: Judge allows legal challenge into care home deaths' (19 November 2020) at https://www.bbc.co.uk/news/uk-england-devon-55007355 accessed 22 July 2021.
[44] *Dolan and others v Secretary of State for Health and Social Care [2020] EWHC 1786 (Admin).*
[45] See above, SI 2020/350.
[46] *R (Dolan and others) v Secretary of State for Health and Social Care & another* [2020] EWCA Civ 1605.

Outdoor Education Centre – submitted a pre-action protocol letter and sought to challenge the decision-making which forced outdoor education centres to remain closed for groups to stay overnight.[47]

The hospitality industry has also been hit particularly hard by the initial enforced closure of premises, but also later in the pandemic with significant capacity restrictions and conditions governing the phased re-opening of premises. In England, the High Court recently found that the Government may have unlawfully discriminated against black and minority ethnic people under the Equality Act 2010 with its policy, introduced in December 2020, of ordering public houses to serve alcoholic drinks only with 'substantial meals'.[48] A different legal challenge concerning the reopening date for indoor hospitality was recently rejected by the High Court, with Mr Justice Knowles finding the challenge merely academic given the easing of restrictions and the likely time that would pass having to wait for a hearing.[49] A similar challenge has been proposed in Wales, with the owners of a restaurant arguing that certainty over the timeline of easing of restrictions was needed.[50]

Lastly, one further specific legal challenge in England concerned the detention and legal aid arrangements for immigration detainees held in prisons, which were less favourable than those in place for people held in immigration removal centres.[51] Mr Justice Swift in the High Court ruled that the Government had failed to provide adequate legal advice to people held under immigration powers in jails after a man was left without a lawyer for 10 months and forced to represent himself.

Conclusions – what next?

Whilst the worst of the crisis that necessitated the strictest lockdown measures seems to have now passed, some of the consequences of the pandemic will undoubtedly persist in the medium and long term. England's so-called 'freedom day' – the lifting of most remaining restrictions – took place on 19 July 2021 after being delayed from 21 June. The other nations of the UK appear to be taking a more cautious approach however, with a slower and more gradual easing of restrictions over the coming weeks.

Looking further ahead, on 12 May 2021, the Prime Minister, Boris Johnson, announced that a public inquiry into the Government's handling of the crisis would commence in Spring 2022.[52] The Prime Minister confirmed that this would be 'an independent public inquiry on a statutory basis, with full powers under the Inquiries Act 2005, including the ability to compel the production of all relevant materials and take oral evidence in public under oath'.[53] Depending on its precise mandate and terms of reference, the inquiry may have far-reaching consequences as the decision-making and legality of lockdown measures comes under deeper scrutiny, which was often lacking at the peak of the crisis with the speed at which measures were implemented.

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[47] Brendon Williams, 'Covid: Outdoor education centre fights school trip ban' *BBC News* (11 June 2021) at https://www.bbc.co.uk/news/uk-wales-57438593 accessed 22 July 2021.
[48] Ewan Somerville, 'Substantial meal policy may have discriminated against BAME customers in pubs, High Court rules' *Daily Telegraph* (1 March 2021) <https://www.telegraph.co.uk/news/2021/03/01/substantial-meal-policy-may-have-discriminated-against-bame/> accessed 22 July 2021. The case did not proceed to trial, as the rule was no longer in place.
[49] Emily Hawkins, 'High Court rules against Lord and Osmond over indoor reopening' *The Morning Advertiser* (4 May 2021) at https://www.morningadvertiser.co.uk/Article/2021/05/04/Sacha-Lord-Hugh-Osmond-High-court-case-against-Government-on-indoor-pubs accessed 22 July 2021.
[50] Thomas Deacon, 'Cardiff restaurant to take legal action against Welsh Government over lockdown' *Wales Online* (25 March 2021) at https://www.walesonline.co.uk/whats-on/food-drink-news/sticky-fingers-cardiff-hospitality-reopening-20256331 accessed 22 July 2021.
[51] See Mary Bulman, 'Lack of access to lawyers for immigration detainees being held in prison is unlawful, High Court rules' *The Independent* (25 February 2021) <https://www.independent.co.uk/news/uk/home-news/legal-aid-immigration-detention-high-court-b1807244.html> accessed 22 July 2021.
[52] BBC News, 'Covid inquiry: What is it and how will it work?' (12 May 2021) at https://www.bbc.co.uk/news/explainers-57085964 accessed 22 July 2021.
[53] HC Deb 12 May Vol. 695 Col 137.

CASE NOTES

Gender-critical beliefs - Philosophical belief within the meaning of s. 10 Equality Act 2010 - Articles 9, 10 and 17 ECHR

Forstater v CGD Europe and Others (2021) UKEAT/0105/20/JOJ, [2021] 6 WLUK 104

Employment Appeal Tribunal

Facts

The Claimant, Maya Forstater, holds gender-critical beliefs, which include the belief that sex is immutable and not to be conflated with 'gender identity'. She had participated in debates on Twitter about the proposals made by the House of Commons Women and Equalities Committee's Report on 'Transgender Equality' in 2016 to amend the Gender Recognition Act 2004 to remove all its current assessment processes for obtaining a Gender Recognition Certificate, and enable people to change their legal gender by a process of self-declaration. Following this report there was a public consultation about these proposals, which led to considerable public debate. In late 2018, the Claimant had commented on Twitter about the potential impact on women and girls of the proposals for gender self-declaration and had sent tweets, which essentially stated that men could not actually become women.

As a result of sharing her gender-critical beliefs on Twitter, the Claimant's employment as a senior researcher at the Centre for Global Development (CGD), a think tank based in London and Washington, was terminated. She brought a discrimination claim before the Employment Tribunal, arguing that her gender critical beliefs are a philosophical belief and should be protected as such under s.10 of the Equality Act 2010. She also argued that her lack of belief in an inner 'gender' should be protected. In November 2019, there was a preliminary hearing to determine whether her beliefs were a protected philosophical belief within the meaning of section 10.

In order to be protected under s.10, a belief must satisfy five criteria established in *Grainger plc v Nicholson* ([2010] I.C.R 360), which are known as the "Grainger criteria''. The fifth criteria ("Grainger V'') is that the belief must be "worthy of respect in a democratic society and not be incompatible with human dignity and not conflict with the fundamental rights of others''. The Employment Tribunal (ET) found that that the Claimant's beliefs did not meet this criterion because they were "absolutist'' in nature; and because the Claimant would "refer to a person by the sex she considers appropriate even if it violated their dignity and/or creates an intimidating, hostile, degrading or offensive environment''. The ET reached this conclusion because the Claimant had stated that, while she would use preferred pronouns a matter of courtesy, she reserved the right not to do so in some circumstances. The Claimant appealed the ET's decision. The Equality and Human Rights Commission and the non-governmental organisation Index on Censorship, which monitors freedom of expression in the UK, were intervenors in the appeal. Both organisations sought to question the ET's judgment.

The decision of the Employment Appeal Tribunal

The Employment Appeal Tribunal noted the ET's findings as to the Claimant's belief:

> 77. The core of the Claimant's belief is that sex is biologically immutable. There are only two sexes, male and female. She considers this is a material reality. Men are adult males. Women are adult females. There is no possibility of any sex in between male and female: or that a person is neither male nor female. It is impossible to change sex. Males are people

> with the type of body which, if all things are working, are able to produce male gametes (sperm). Females have the type of body which, if all things are working, is able to produce female gametes (ova), and gestate a pregnancy. It is sex that is fundamentally important rather than "gender'' "gender identity'' or "gender expression''. She will not accept in any circumstances that a trans woman is in reality a woman or that a trans man is a man. That is the belief that the Claimant holds.'

The Appeal Tribunal referred to this belief as the Claimant's ''gender-critical belief''. It found that this belief was protected under s.10 of the Equality Act 2010 and upheld the Claimant's appeal. The sole issue in the appeal was whether the ET had erred in law in reaching the conclusion that the Claimant's gender-critical beliefs did not satisfy the criterion in Grainger V, and therefore were not a philosophical belief within the meaning of s.10. The case will now return to the Employment Tribunal for a determination of the substantive issues in Forstater's discrimination claim.

The Appeal Tribunal found that the ET had erred in its application of Grainger V, and held that a philosophical belief would only be excluded for failing to satisfy Grainger V if it was a belief akin to Nazism or totalitarianism, and therefore liable to be excluded from the protection of rights under Articles 9 and 10 of the European Convention on Human Rights 1950 by virtue of Article 17 of that Convention. Accepting the Claimant's submission that Article 17 is the appropriate standard against which Grainger V should be assessed, it found that the Claimant's gender-critical beliefs clearly did not fall into the category of beliefs which would be excluded from protection by Article 17. Noting that these beliefs were widely shared and did not seek to destroy the rights of trans persons, it found that the Claimant's beliefs fell within the protection of Article 9(1) and therefore within s.10, notwithstanding that they were offensive to some people and could in some circumstances potentially result in the harassment of trans person.

The Appeal Tribunal noted that it was appropriate to consider the effects of Article 9 and 10 ECHR in its analysis of s.10. It stated that the approach to be taken should be to consider the case law in relation to the most applicable right, interpreted where appropriate in the light of the other, as set out in *Ibragimov v Russia* ((2019) 1413/08 & 2862/11 [78]). It was not in dispute that the most directly applicable right in this case was the Article 9 right to freedom of belief. The Appeal Tribunal further noted that the paramount guiding principle in assessing any belief is that it is not for the Court to inquire into its 'validity' by some objective standard. The freedom to hold whatever belief one likes requires the State to remain neutral as between competing beliefs, refraining from expressing any judgment as to whether a particular belief is more acceptable than another, and to try to ensure that groups who hold opposing beliefs tolerate each other (*Metropolitan Church of Bessarabia v Moldova* 92002 35 EHRR 13, paras 1125 and 116).

In order to be protected under Article 9, a belief need only satisfy very limited threshold requirements, and the bar should not be set too high (*Harron v Chief Constable of Dorset Police* [2016] IRLR 481 (EAT) [34]*, Gray v Mulberry* [2020] I.C.R. 715 [27]). The Appeal Tribunal noted that Grainger V was derived from passages in two earlier decisions: *Campbell and Cosans v United Kingdom* 4 EHRR 293, and *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15.

In *Campbell and Cosans,* the European Court of Human Rights had regard to the Convention as a whole, including Article 17, in deciding that the applicant's views on corporal punishment in schools did amount to a philosophical conviction. Article 17 prohibits the use of the ECHR to destroy the rights of others, and the Appeal Tribunal noted that Article 17 would prevent reliance on the right to freedom of expression to espouse hatred, violence or a totalitarian ideology that is wholly incompatible with the principles of democracy. It stated that the fundamental freedoms and rights conferred by the Convention would be seriously diminished if Article 17, and the effective denial of a Convention right, could be too easily invoked. It also stated that in maintaining plurality, which is the hallmark of a functioning democracy, the range of beliefs that must be tolerated is very broad. In order for a belief to satisfy the threshold requirements to qualify for protection, it need only be established that it does not have the effect of destroying the rights of others. The Appeal Tribunal also noted that in *Williamson* the example

given by the House of Lords of manifestations of religious beliefs that would not qualify for protection, were those which involved subjecting others to torture or inhuman punishment. It stated that this reference was consistent with the principle that only the gravest violations of Convention principles should be denied protection, as such violations seek to destroy rights.

The Appeal Tribunal found that Article 17 is the benchmark against which belief is to be assessed, and that only a belief that involves a very grave violation of the rights of others, tantamount to the destruction of those rights, would be one that is not worthy of respect in a democratic society. It noted that *Grainger* is derived from case law concerned with Convention rights and found that it was therefore correct to apply s.10 with Article 17 in mind.

The Appeal Tribunal found that at the preliminary stage of deciding whether a belief qualified for protection, the manifestation of the belief - where there is any manifestation - can be no more than a part of the analysis and should only be considered in determining whether the belief meets the threshold requirements in general. It noted that an approach that placed the focus on manifestation might lead the Tribunal to consider whether a particular expression is protected, rather than concentrating on the belief in general and assessing whether it meets the Grainger criteria. The Appeal Tribunal stated that this follows from the language of s.10, which is concerned only with whether a person has the protected characteristic by virtue of the belief in question, and not with whether a person does anything pursuant to that belief. A belief may be afforded protection while its manifestation may, depending on the circumstances, justifiably be restricted under Article 9(2) or Article 10(2) of the Convention.

The Appeal Tribunal noted that gender-critical beliefs are widely shared and are consistent with the law (*Corbett v Corbett* [1971] P83); and stated that,

> Where a belief or a major tenet of it appears to be in accordance with the law of the land, then it is all the more jarring that it should be declared as one not worthy of respect in a democratic society. [115].'

The Appeal Tribunal found that the ET had erred in its approach in assessing the Claimant's belief that biological sex is immutable. It stated that:

> The Tribunal appears here to be straying into an evaluation of the Claimant's belief. In our judgment, it is irrelevant in determining whether a belief qualifies for protection that some of its tenets are considered by the Tribunal to be unfounded, or that it might be possible for the Claimant's concerns to be allayed without adhering to or manifesting her belief. By expressing the view that it did and by proposing steps that the Claimant could take so as not to manifest her belief in a certain way, the Tribunal, was, it seems to us, implicitly making a value judgment based on its own view as to the legitimacy of the belief. In doing so, the Tribunal could be said to have failed to remain neutral and/or failed to abide by the cardinal principle that everyone is entitled to believe whatever they wish, subject only to a few modest, minimum requirements.[85]'

In relation to the ET's comments about the "absolutist'' nature of the Claimant's beliefs, the Appeal Tribunal stated that "absolutism" cannot be a valid criterion for determining whether or not a belief falls to be protected. If it were, then the more fervently a belief is held, the less likely it would be to qualify for protection. The Appeal Tribunal also noted that the ET's suggestion that the Claimant "would always, indiscriminately and gratuitously 'misgender' '' trans people was inconsistent with the ET's own findings that the Claimant would "generally seek to be polite to trans persons and would usually seek to respect their choice of pronoun but would not feel bound to do so… [89]''

In respect of the ET's view that the Claimant was not entitled in any circumstances to refer to a ''trans woman'' holding a Gender Recognition Certificate as a man, the Appeal Tribunal noted that the reference in s. 9 of the Gender Recognition Act 2004 to a person with a Gender Recognition Certificate becoming ''for all purposes'' the acquired gender means for all ''legal purposes'' [97]. It stated that:

> The effect of a GRC, whilst broad as a matter of law, does not mean that a person who, like the Claimant, continues to believe that a trans women with a GRC is still a man, is necessarily in breach of the GRA by doing so; the GRA does not compel a person to believe something that they do not… [99]'

The Appeal Tribunal went on to say that:

> Referring to a trans person by their pre-GRC gender in any of the settings in which the EqA applies could amount to harassment related to one of more protected characteristics; whether or not it does will depend, as in any claim of harassment, on a careful consideration of all relevant factors… [99].'

Analysis

This is a very significant case in upholding freedom of belief and expression, which is fundamental to the maintenance of democracy. This decision protects gender critical beliefs and lack of belief in gender identity. It also protects belief in gender identity. During the public debates about the nature of sex and gender that followed the proposals to reform the Gender Recognition Act there have been concerted attempts to try to silence the expression of gender-critical beliefs. The Appeal Tribunal in *Forstater* noted the evidence presented in the case of *R (Harry Miller) v The College of Policing and Another* ([2020] EWHC 225 (Admin)) about the hostility with which the expression of gender-critical beliefs is often met.

Miller was a judicial review in respect of the police response to the Claimant's gender-critical tweets, in which the High Court found that the police had interfered with the Claimant's right to freedom of expression under Article 10 of the Convention in a manner that was unlawful. Evidence from Professor Kathleen Stock in *Miller* described a ''hostile climate'' facing gender-critical academics within some UK universities [243]. Jodie Ginsberg, who was then the CEO of Index on Censorship, made a statement in evidence in which she said:

> Index is concerned by the apparent growing number of cases in which police are contacting people about online speech which is not illegal and sometimes asking for posts to be removed. This is creating confusion among the wider population about what is and is not legal speech, and – more significantly – further supressing debate on an issue of public interest, given that the government invited comment on this issue as part of its review of the Gender Recognition Act… Police actions against those espousing lawful, gender critical views – including the recording of such views where reported as 'hate incidents' – create a hostile environment in which gender critical views are silenced. This is at a time when the country is debating the limits and meaning of 'gender' as a legal category…It has been reported that the hostile environment in which this debate is being conducted is preventing even members of parliament from expressing their opinions openly… [249]'

In *Miller* Knowles J stated:

> I take the following points from this evidence. First, there is a vigorous ongoing debate about trans rights. Professor Stock's evidence shows that some involved in the debate are readily willing to label those with different viewpoints as 'transphobic' or as displaying 'hatred' when they are not. It is clear that there are those on one side of the debate who simply will not tolerate different views, even when they are expressed by legitimate scholars whose views are not grounded in hatred, bigotry, prejudice or hostility, but are based on legitimately different value judgements, reasoning and analysis, and form part of mainstream academic research… [250]'

Following the *Forstater* judgment, organisations which enable or fail to prevent the kind of hostile environment described in evidence in *Miller* could be open to claims of unlawful harassment or discrimination under s. 26 of the Equality Act. In *Vajnai v Hungary* ((2010) 50 EHRR 44), the European Court of Human Rights emphasised that special protection should be afforded to political speech and debate on matters of public interest. The hostile environment which has silenced gender-

critical views in recent public debates is not conducive to the development of law and policy about sex and gender which fairly balances the rights of different groups with protected characteristics. The *Forstater* judgment should help to create an environment which is more conducive to open, constructive debate, and therefore more conducive to the development of good public policy.

Maureen O'Hara, Assistant Professor in Law, Coventry Law School

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Human rights – freedom of assembly – right to strike – action short of dismissal – statutory interpretation – Human Right Act 1998

Mercer v Alternative Future Group Ltd [2021] 6 WLUK 13

Employment Appeal Tribunal

The Facts

M was a workplace representative for her trade union and was involved in organising strikes. She was suspended from work and subjected to disciplinary action and before the employment tribunal she claimed that she had been subjected to a 'detriment' by being suspended, contrary to s.146 of the Trade Union and Labour Relations Consolidation Act 1992, which provides:

> A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—
>
> (a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,
>
> (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so,
>
> (ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or
>
> (c) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.
>
> (2) an appropriate time" means—
>
> (a) a time outside the worker's working hours, or
>
> (b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services;
>
> and for this purpose "working hours", in relation to a worker means any time when, in accordance with his contract of employment (or other contract personally to do work or perform services), he is required to be at work.

Section 152 of the Act then provides similar protection to workers who are dismissed for such reasons, but Part V of the Act deals with dismissal on grounds of taking part in a strike, making such a dismissal fair.

The employer resisted the claim on the ground that taking part in industrial action could not be an activity protected by s.146. The employment tribunal concluded that s.146 did not extend to industrial action and that UK law failed to provide effective judicial protection in respect of industrial action,

contrary to Article 11 of the European Convention on Human Rights 1950, which guarantees the right to freedom of peaceful assembly and association. The tribunal also concluded that s.146 could not be interpreted in such a way as to make it compliant with Article 11, finding that the "grain" of the legislation as a whole distinguished between protection for participation in trade union activities in Part 3 of the 1992 Act, and taking industrial action in Part 5. Accordingly, to interpret s.146 as including industrial action would undermine the legislative scheme.

The employee now submits that the tribunal had failed to exercise the duty under s.3 of the Human Rights Act 1998 to interpret s.146 in a way that was compliant with Article 11 rights. The Secretary of State, acting as intervener, submitted that the fact that protection under s.146 only applied to activities undertaken ‘‘at an appropriate time’’ meant that it could not have been intended that the protection should apply to industrial action, which would by definition not be at ‘‘an appropriate time’’.

The decision of the EAT

Allowing the appeal, the EAT stated that as a matter of ordinary language, the phrase "activities of an independent trade union" in s.146 would be apt to include industrial action. However, the Appeal Tribunal stressed that it was not the meaning of those words that led to the exclusion of industrial action from the scope of s.146. Rather, it was the effect of s.152 of the Act, which protected against dismissal on the ground of participating in the activities of a trade union, read with those provisions in Pt V of the 1992 Act dealing specifically with dismissal for participating in industrial action. Thus, if dismissal for taking part in industrial action was dealt with in Pt V, such action could not fall within the activities of a trade union under s.152 (*Drew v St Edmundsbury BC* [1980] I.C.R. 513). Accordingly, on the ordinary principles of construction, s.146 excluded industrial action (at paras 27-28, 31).

Dealing then with the Convention rights, the EAT stated that Article 11 conferred a qualified right to freedom of association and assembly, including the right to participate in trade union activity. Restrictions on the exercise of that right were permitted where they were "prescribed by law" and "necessary in a democratic society" to protect the rights and freedoms of others, and the state was under a positive obligation to secure the enjoyment of those rights (*Wilson v United Kingdom* (30668/96) [2002] I.R.L.R. 568*)*. The right to strike was protected by Article 11, and a narrower margin of appreciation applied in relation to restrictions on industrial action than was afforded to contracting states in the area of trade union rights generally, given the sensitive social and political issues involved (*National Union of Rail, Maritime and Transport Workers v United Kingdom* (31045/10) [2014] I.R.L.R. 467) (At paras 32-33, 47, 55).

The EAT then considered the compatibility of s.152 with Article 11, stressing that whether the failure of s.146 to encompass industrial action was justified under Article 11(2) ECHR was a question of proportionality. The exclusion of industrial action was not due to any legitimate aim of avoiding the imposition on employers of an obligation to pay workers who went on strike, since it was not in dispute that employers were entitled to withhold pay in such circumstances. Further, to permit disciplinary action against workers simply for exercising the right to strike would fundamentally contradict the case law of the European Court of Human Rights. No other objective for the measure had been identified as sufficiently important to justify a limitation on the ECHR right, and there was no evidence that the measure struck a fair balance between the competing interests of workers seeking to exercise their trade union rights and those of the employer and the community as a whole. It followed, therefore, that there had been a breach of Article 11 (At paras 57, 60-64, 68).

Having decided that s.152 appeared to violate Article 11, the EAT then considered whether s.146 should be read down so as to make it consistent with the Article and the case law of the European Court, above**.** The employer had argued that a compatible interpretation of s.146 was not possible because the inclusion of industrial action within its scope would introduce an inconsistency between two provisions using the same wording, thus rendering the provisions of Pt V of the Act a dead letter and going against the grain of the legislation. However, in the EAT’s view, the inconsistency that might arise between s.146 and s.152 if the former were interpreted so as to include industrial action was not reason enough

on its own to reject a conforming interpretation. The same wording could bear different interpretations depending on whether ECHR rights were engaged, and Part V would only be rendered a dead letter if, as a result of the obligation under s.3 of the Human Rights Act being applied to s.146, the same interpretation had to be applied to s.152, which was not the case.

Nor, in the EAT's view, was there anything to suggest that the "grain" of the legislation was to exclude protection against detriment for those participating in industrial action. If it had been intended to exclude any form of industrial action from s.146 protection, doing so by reference to "at an appropriate time" would create an imprecise and permeable barrier between what was and was not excluded. Industrial action could take place outside working hours. Moreover, the fact that the words "at an appropriate time" did not clearly and unambiguously exclude industrial action meant that the provision was amenable to being interpreted conformably with ECHR rights (*Ghaidan v Godin-Mendoza* [2004] UKHL 30) (At paras 22, 70-71, 75, 82-83).

Thus, in the EAT's view it was not going against the "grain" of the 1992 Act to achieve a conforming interpretation of s.146 by adding a new sub-paragraph (c) to the definition of "an appropriate time" in s.146(2), to read "a time within working hours when he is taking part in industrial action". That would not involve judicial legislation or the court making any policy choices, but would simply give effect to a clear and unambiguous obligation under Article 11 to ensure that employees were not deterred, by the imposition of detriments, from exercising their right to participate in strike action (At paras 86, 90, 93).

Analysis

The decision raises interesting questions for both constitutional and labour lawyers. Specifically it raises issues concerning the effect of European Convention law on domestic employment law and the compliance of that law with the Convention and the relevant jurisprudence of the European Court of Human Rights. With respect to the constitutional issues, the dilemma for the Appeal Tribunal in this case was how to interpret a seemingly incompatible statutory provision – one that did not appear to allow a striking worker to be protected from action short of dismissal – into one that did give such protection. This has to be done without indulging in judicial legislation or by ignoring the clear words of an Act of Parliament, or more generally the Act's purpose, or 'grain'.

Before examining how the EAT used the Human Rights Act 1998 to achieve that result, a few basic principles need to be outlined. Under s.2 of the 1998 Act the courts and tribunals must take into account the case law of the European Court when deciding cases raising Convention rights (although they do not have to follow such decisions). Then, under s.3, the court or tribunal are allowed to interpret legislation, if at all possible, in line with Convention rights and case law, and if that is not possible, under s.4 certain courts (High Court and above) are allowed to declare that legislation incompatible with the Convention right (such provisions remaining effective until they are altered by Parliament). In this case, as the EAT are not empowered to issue declarations of incompatibility, its only task was to interpret ss.146 and 152 of the 1992 Act in line with Article 11 ECHR and the relevant case law, both of which would favour the protection of striking workers from action short of dismissal. Its main obstacle, however, appeared to be the apparent purpose of the Act itself, which treated striking workers detrimentally when it came to dismissal.

Section 3 of the Act allows the courts to adopt a different interpretation to statutory provisions than applied by the courts before the Act and thus disrupts the doctrine of judicial precedent, allowing a court to disregard the previous decision of a higher court if necessary. However, under s.3 the doctrine of parliamentary sovereignty is preserved by the Act. Thus, s.3 provides that although it applies to primary legislation and subordinate legislation whenever enacted, it does not affect the validity, continuing operation or enforcement of any incompatible primary legislation, or the validity, continuing operation or enforcement of any incompatible subordinate legislation if primary legislation prevents removal of the incompatibility. Thus, if the courts, by using their interpretation powers under s.3, are unable to interpret primary legislation in conformity with Convention rights, the primary legislation continues in force and the courts have no power to strike the Act down. Accordingly, whether

parliamentary sovereignty will be truly compromised by the courts under the Act will depend on the extent to which the courts use their interpretation powers under s.3 of the Act, and how they interpret the words 'wherever possible'.

Section 3 extends the court's powers of interpretation in that the court does not have to find a true ambiguity in the statute, provided the Convention interpretation is *possible*. Evidence of the courts' willingness to abandon traditional principles of interpretation was shown in *R* v *A (Complainant's Sexual History)* ([2001] 3 All ER 1), where the House of Lords held that the interpretative obligation under s.3 applied even where there was no ambiguity, and placed on the court a duty to strive to find a possible interpretation compatible with Convention rights. Consequently, s.3 required the courts to proceed on the basis that the legislature would not, if alerted to the problem, have wished to deny the protection afforded by a Convention (in that case to a fair trial). In that case, therefore, the majority of the House of Lords allowed the insertion of words into an existing statutory provision so that it complied with a Convention right.

However, in *Re W and B* [2002] 2 WLR 720, the House of Lords sounded a clear warning against judicial legislation, stressing that the Act maintained the constitutional boundary between the interpretation of statutes and the passing and repeal of legislation. Thus, a meaning that departed substantially from a fundamental feature of an Act of parliament was likely to have crossed that boundary. As a result, courts should not allow the principles and case law of the Convention to overrule the clear words and intention of domestic legislation, and must use their powers under s.4 of the Act rather than distort the clear intention of parliament. Again, in *R (Anderson and Taylor)* v *Secretary of State for the Home Department* ([2002] 3 WLR 1800), the House of Lords warned the courts of vandalising the statutory wording, and giving the section an effect quite different from that which parliament intended. However, the distinction between interpretation and judicial law making can be difficult to maintain. For example, in *Bellinger* v *Bellinger* ([2003] 2 AC 467), the House of Lords held that it was not possible to interpret the words 'man and woman' used in s.11 of the Matrimonial Clauses Act 1971, to include a person who had undergone gender reassignment. That, in their Lordships' view, would include giving the expressions 'male' and 'female' a novel and extended meaning. In contrast, in *Mendoza* v *Ghaidan* ([2004] 2 AC 557), the House of Lords held that it was possible to interpret the legislation so as to avoid an incompatibility, and that the words 'living together as man and wife' could be construed as meaning *as if they* were living together as man and wife.

The test employed by the EAT in the present case was whether the suggested interpretation would clash with the 'grain' of the legislation; in other words its fundamental purpose. The 1992 Act clearly intended to exclude striking workers from protection from unfair dismissal (Part V of the Act), but could a court add words into the statutory provision that prohibited action short of dismissal and thereby treat strike action as an 'activity of a trade union'? Certainly, the words 'activity of a trade union' were capable of including strike action, but the main concern was that that would cause a conflict in terms of the Act's purpose – the argument being that the Act intended to exclude striking workers from the Act's protection. The EAT circumvented this by confirming that the new interpretation would not have to mean that s.152 would have to be interpreted to protect striking workers from dismissal – an interpretation that would not be possible given the Act's clear purpose with respect to *dismissal* of strikers. That left s.146 being added to in order to protect striking workers from *action short of dismissal*. That in the EAT's view was not only linguistically capable, but would produce a Convention-compliant result without damaging the clear intention of the Act to penalise strikers in the context of unfair dismissal. Further, it was justified because Parliament had not *expressly* excluded the striker from protection in s.146.

The EAT might be well be accused of judicial legislation by some, for they would argue that the clear intention of Parliament was to exclude strike action from protection in terms of dismissal *and* action short of dismissal. However, the courts and tribunals have been given an express mandate under s.3 to interpret legislation in a Convention friendly way, and in this case the EAT have achieved that by prohibiting action short of dismissal (which would be contrary to Article 11) as opposed to dismissal (which is Convention compliant). Had a declaration of compatibility been available, the EAT may have been better advised to issue such a declaration, thus leaving it to Parliament to amend, or retain the law.

As it is, the EAT have created a new interpretation in line with the intention of the 1998 Act, to ensure compatibility with Convention rights where that is possible. In this case, therefore, Parliament is at liberty to amend the law, and make it perfectly clear that strikers are unprotected from action short of dismissal. That would mean admitting that we are not willing to abide by international law and the case law of the European Court, which might indeed reflect the current attitude to European Law, and indeed to human rights in general.

With respect to employment law and employment law rights, the significance of this decision – should it ultimately be upheld – cannot be understated. English Law does not recognise a 'right to participate in industrial action' and in the early days of recognised trade union activity the House of Lords vehemently strove to ensure that industrial action was incredibly difficult to undertake (*Taff Vale Railway Co v Amalgamated Society of Railway Servants* 1901] AC 426, HL, *Quinn v Leathem* [1901] AC 495, HL). Relief from legal liability in respect of industrial action is enshrined in s.219 of the Trade Union and Labour Relations (Consolidation) Act but this is not the same as a general 'right to strike' or a right to take industrial action. For individuals dismissed as a result of taking official industrial action there is limited legal protection under s.238A of the TULRC 1992 providing the industrial action can be said to have taken place within 'protected' official action, i.e. an official strike during which the Union has complied with all the necessary procedural requirements, and then only within the basic period of 12 weeks (s.238A, 7B).

Another circumstance is if the employee is 'selectively dismissed' for taking the industrial action under s.238. In cases of 'unofficial' industrial action there are certain protections covering employees dismissed whereby the cause of such unofficial action is related to a limited class of matters including health and safety issues or protected disclosures under s.237(1A). However, under s.46(5A) TULR(C)A, a dismissal cannot amount to a detriment. There is no definition of what 'detriment' means within the section, but examples of what has been held to amount to 'detriment' in the past have included reprimands and warnings (*British Airways Engine Overhaul Ltd v* Francis 1981 ICR 278, EAT), being demoted from the employee's current job to a position of lower status (*Murphy v Blackpool Grand Theatre Trust* Ltd ET Case No.27062/81), and transferring an employee to a different job within the same organisation (*Robb v Leon Motor Services Ltd* 1978 ICR 506, EAT). Furthermore, examples of 'detriment' within the context of Trade Union activities have been held to be overtime reductions where a union representative was attending a union training course (*Edgoose v Norbert Dentressangle Ltd* ET Case No.2601906/08), and conduct that may potentially embarrass or otherwise undermine the position of a trade union representative before his members (*Lyon v Mersey Care NHS Trust* ET Case No.2408139/15). 'Detriment' can also extend to post-employment detriments, such as a refusal to provide a reference (*Woodward v Abbey National plc* [2006] EWCA Civ 822). The meaning of 'detriment', therefore, is wide-ranging and broad.

The meaning of 'industrial action' is likewise not defined by statute, Sir John Donaldson once commented that 'the forms of industrial action are limited only by the ingenuity of mankind' (*Seaboard World Airlines Inc v Transport and General Workers' Union and* others [1973] ICR 458, at 460). The most commonly known form of industrial action is, of course, strike action but there are many others – work to rule and overtime bans being among the most frequently reported examples.

In contrast to the domestic position, where no general right to strike or to take industrial action is recognised, the European Court of Human Rights has held that the right to strike under Article 11 is a 'fundamental' human right (*Enerji Yapi-Yol Sen v Turkey* (Application No.68959/01), ECtHR), and it has been further held that national law which allows detriments to be imposed for exercising such a right are a breach of Article 11 rights. This was shown in the case of *Danilenkov and others v Russia* (Application No.67336/01, ECtHR), where members of a dockers' trade union were subjected to what could under English Law be clear examples of 'detriment' following a two-week strike over pay and conditions.

Regardless of where the case of *Mercer* leads, the claimant could clearly mount a challenge against the United Kingdom at the European Court of Human Rights in respect of the effect of s.146. Both the

Employment Tribunal and the EAT were in agreement that there was an infringement of Article 11 and, based on the European case law, it is likely that the European Court of Human Rights would agree.

The ultimate impact of this particular case could be seismic. Domestically, the right to take industrial action is barely tolerated on a legislative level and such a decision may pave the way to an accepted right to take industrial action in English Law. This being said, it is likely that any such decision brought about by association with the European Convention on Human Rights and, by extension, the Court of Human Rights, would not be politically welcomed by the current administration set against the backdrop of its present weakening relationships with other European institutions. In any case, if the decision is met with tolerance, then more claims should be expected regarding the definition of 'industrial action' over the coming years, with Parliamentary intervention a possibility in the absence of any politically favourable judicial pronouncements.

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Free speech – freedom from discrimination – duty of diversity - dismissal from office

Page v Lord Chancellor [2021] EWCA Civ 254; *Page v NHS Trust Development* Authority [2021] EWCA Civ 255

Court of Appeal

The Facts and decision

In the first case - *Page v Lord Chancellor* - a lay magistrate (P) appealed against a decision of the Employment Appeal Tribunal, upholding an employment tribunal's conclusion that he had not been victimised by the respondents, the Lord Chancellor and the Lord Chief Justice. In 2014, P sat as a member of the family panel determining an unopposed adoption application by a same-sex couple. Based on his beliefs as a Christian, he expressed views to his fellow magistrates making it clear that he objected to same-sex couples adopting children; he then declined to sign the adoption order. These acts led to a disciplinary hearing and his being formally reprimanded by the Lord Chief Justice and the Lord Chancellor. Subsequently, P gave an interview on national television in which he expressed his belief that it was better for a child to be adopted by a man and a woman (in court accepted as the "broadcast words"). That led to further disciplinary proceedings and his removal from the magistracy. P complained to the employment tribunal of victimisation, alleging that the second round of disciplinary proceedings had been brought because he had done a protected act within the meaning of s.27 of the Equality Act 2010, namely complaining that the first round of proceedings was discriminatory. The employment tribunal dismissed his claim, finding that he had been removed because he had publicly stated that in adoption cases he was not prepared to put aside his own beliefs and discharge his functions as a magistrate according to the law and the evidence. The tribunal conceded that his removal interfered with his right to freedom of expression under Article 10 of the European Convention on Human Rights 1950, but then found that the interference was justified under Article 10(2) in the interests of maintaining the authority and impartiality of the judiciary. The Employment Appeal Tribunal upheld the tribunal's decision.

P appealed to the Court of Appeal on the following grounds:

(1) In identifying the protected act, the employment tribunal and EAT should have looked beyond the broadcast words and seen that they substantiated his allegation that he had been discriminated against because of his religious beliefs;

(2) The tribunal and EAT had erred in their analysis of the decision in *Martin v Devonshire Solicitors* [2011] ICR 352, which distinguished between unlawful victimisation and punishment for a separate feature of the complainant's conduct;

(3) The EAT erroneously conflated the respondents' "reason" for removing him with their "motive" for doing so;

(4) The tribunal and EAT had erred in their analysis of Article 10 of the Convention.

In the Court of Appeal, it was held that the Lord Chancellor and the Lord Chief Justice had not victimised P by removing him from office after he gave a television interview. This was because he had not been removed for the protected act of alleging that he had been discriminated against, but for publicly declaring that in cases involving adoption by same-sex couples he would proceed not on the basis of the law and the evidence but on the basis of his own beliefs.

In dismissing P's appeal, the Court of Appeal firstly considered whether there had been a protected act which P could rely on as the basis of his victimisation claim. The Court held that although the broadcast words did not *of themselves* constitute a protected act, it was legitimate to look beyond them. In the Court's view, the tribunal had done that by allowing P to characterise the interview, as a whole, as an assertion that he had been disciplined because of his Christian views. Thus, the tribunal could not be criticised in that respect. (At paras 51-52).

With respect to the tribunal's interpretation of *Martin* – the Court followed that case and *Panayiotu v Kenaghan* ([2014] IRLR 500). It noted that *Martin* established that a dismissal in response to a complaint of discrimination would not constitute victimisation if the reason for it was not the complaint as such, but some feature of it that could properly be treated as separable. In the Court's view, while it was important that the protection provided by the anti-victimisation provisions should not be undermined, the circumstances did not have to be exceptional for the *Martin* principle to apply. Tribunals could be trusted to recognise those features that were properly separable from the making of the complaint.[1] In any event, the instant case was not in *Martin* territory because P's decision letter identified the relevant misconduct as the magistrate's statement of how he would perform his duties in the case of a same-sex adoption. The tribunal's unchallenged finding was that the letter was a true reflection of the reasons for removal. It was easy to see why the Lord Chancellor and the Lord Chief Justice would regard it as unacceptable for a magistrate to state on television that he had a bias against same-sex adoption. Finally, one of the three stated reasons for the decision to refer the magistrate's conduct to the second disciplinary panel was that the interview had led to negative publicity, involving criticism of the respondents which could bring the judiciary into disrepute. Although "criticism of the respondents" could only refer to the magistrate's criticism of their having reprimanded him, the tribunal found that the second disciplinary proceedings were not motivated by the magistrate having made a complaint, and there was no basis for interfering with that finding. (At paras 55-56).

On the third ground with respect to motive, the Court of Appeal held that it was well- established in *Martin* and *Reynolds v CLFIS (UK) Ltd* ([2015] EWCA Civ 439), that a benign motive for detrimental treatment was no defence to a victimisation claim. Further, there had been no error in the EAT's reasoning in that respect; the EAT had referred to "motivation" - which was not the same as "motive" and thus had not conflated or confused the respondents' motive (At paras 68-70).

Finally, with respect to Article 10 ECHR, P had relied on the proposition laid down by the Court of Appeal in *R (on the application of Ngole) v University of Sheffield* ([2019] EWCA Civ 1127). This he had done to argue that someone who had expressed discriminatory views did not necessarily mean that they would allow those views to affect their professional conduct. However, in the Court of Appeal's view, that was beside the point, because in this case P had publicly stated that his views *would* affect his conduct as a magistrate, meaning that he would be biased in the execution of his judicial duties. The statement also meant that his case was distinguishable from other cases decided by the European Court of Human Rights, and that the tribunal was right to find that the making of it compromised his judicial impartiality such that his removal was a justified and proportionate sanction (At paras 78-83).

In the second case - *Page v NHS Trust Development Authority* – P had been a non-executive director of an NHS and social care trust responsible for delivering mental health services; and the authority was responsible for his appointment. P was also a lay magistrate, sitting in family cases. He was a devout Christian and firmly believed that it was in a child's best interests to be brought up by a mother and a father. When he was reprimanded by the Lord Chief Justice for declining to agree the adoption of a child by a same-sex couple (see above), he spoke to the press about his views on same-sex adoption. The events came to the trust's attention, and it raised with him the connection that might be made between his views in media interviews and his role with the trust, instructing him to alert it about any further media coverage. Following further disciplinary action by the judicial authorities, he was removed as a magistrate. Without prior notice to the trust, he gave a number of media interviews in which he alleged that the magistracy had discriminated against him because of his religious belief. The authority suspended him and decided against renewing his term. This was based on its concern that his actions could damage the trust's ability to serve its LGBT patients, who already had difficulty engaging with the trust's services, and that his actions were likely to negatively affect the confidence of staff, patients and the public in general in the appellant as a local NHS leader. P brought religious discrimination and victimisation claims against the authority under the Equality Act 2010, but the employment tribunal rejected the claims, and the EAT upheld the tribunal's decision.

On appeal to the Court of Appeal, it was held that P had not been discriminated against because of his religious belief. Rather, in the Court's view, the disciplinary action had been taken against him because he had, without prior notice to the trust, given media interviews in which he had expressed views about same-sex adoption and homosexuality which were liable to impact on the trust's ability to engage with gay service-users, and had shown no insight into why that was problematic. The reason for the disciplinary action had not, therefore, been because he was a Christian, or because he believed that it was in a child's best interests to be brought up by a mother and a father.

With respect to Article 9 ECHR, the tribunal had found that, even if the appellant's rights under Article 9 were engaged, any interference with those rights was justified, and in the Court's view, it been entitled to reach that conclusion on justification. The appellant had expressed views about homosexuality that had gone beyond same-sex adoptions and the case had been based specifically on the risk that the fact that a member of the trust's board held the views that the appellant did about homosexuality might deter mentally ill gay people in the trust's catchment area from engaging with its services. That risk related directly to the trust's ability to perform its core healthcare functions. Finally, the appellant's conduct had made it impossible to find a way forward that might have respected both parties' interests (at paras 51 and 59-63)

Turning to the direct discrimination claim, it was held that the essential question was whether the act complained of was done because of the protected characteristic. Thus, it was necessary to characterise the putative discriminator's reason for acting. In the context of the protected characteristic of religion or belief, case law recognised a distinction between cases: (a) where the reason was the fact that the claimant held and/or manifested the protected belief, and (b) where the reason was that the claimant had manifested that belief in some particular way to which objection could justifiably have been taken. In the latter case, it was the objectionable manifestation of the belief, and not the belief itself, which was treated as the reason for the act complained of (*Chondol v Liverpool City Council* [2009] 2 WLUK 266, *Grace v Places For Children* [2013] 11 WLUK 78, and *Wasteney v East London NHS Foundation*

Trust [2016] 4 WLUK 120). The tribunal had applied that distinction, and the authority had taken disciplinary action against the appellant not because he was a Christian or because of his belief that it was always in a child's best interests to be brought up by a mother and a father. Rather it was because he had expressed the latter belief in the national media in circumstances which justified the action that was taken. Thus, there had been no error of law in the tribunal's decision on direct discrimination (at paras 68-69, 72, 74, 80).

The Court also rejected indirect discrimination claim, noting that the tribunal had rejected the claim on the ground that, even if there had been a provision, criterion or practice that put Christians at a group disadvantage, it had been justified for the reasons given in relation to Article 9. As the appellant had not challenged the tribunal's finding on justification, it was difficult to see how the tribunal's conclusion on justification in relation to Article 9 would not read over to the indirect discrimination claim (at paras 82, 87, 89). Similarly, the victimisation claim failed. The tribunal had found that the reasons for the disciplinary action taken against the appellant were that he had, without prior notice to the trust, given media interviews in which he had expressed views about same-sex adoption and homosexuality more generally. Those reasons in the trust's view were liable to impact on its ability to engage with gay service-users, and further that he had shown no insight into why that was problematic. Those reasons, in the Court's view, had nothing to do with what he had said about having been discriminated against as a magistrate and thus the victimisation claim failed (at paras 92-94).

Commenting on the implications of the decision, the Court noted that the **c**ourts had shown themselves astute to protect the freedom of Christians to manifest their beliefs in relation to matters of traditional Christian teaching. However, the freedom to express religious or any other beliefs was not unlimited, and there were circumstances in which it was right to expect Christians who worked for an institution, especially if they held a high-profile position, to accept some limitations on how they expressed in public their beliefs on matters of particular sensitivity. Whether such limitations were justified in a particular case and struck a fair balance between the rights of the individual and the legitimate interests of the institution for which they worked, could only be judged by a careful assessment of all the circumstances of the case. In the present case, the tribunal had been entitled to conclude that the authority had not acted unlawfully (at paras 100-101).

Analysis

Both decisions in *Page* appear to adopt the traditional judicial approach in not accommodating individual religious views when enforcing equality and diversion policies, although they provided the Court with an opportunity to review the previous case law

When free speech conflicts with another's right not to be subject to discrimination, the law and the courts are faced with the dilemma of reconciling those two rights. This raises difficulties in deciding whether speech that is potentially discriminatory should qualify as protected speech and whether any protection should be overridden by a more compelling need to offer equality and diversity. This dilemma is magnified when the speaker holds employment or office and is bound by their, or their employer's, duty to uphold such equality and diversity. As a consequence, cases such as the present not only engage debate about the scope and protection of free speech in a democratic society, but also the rights of employees and office holders to express themselves without fear of dismissal or other sanction.

With respect to the issue of free speech, until recently, the courts have given preference to equality policies at the expense of individual speech and beliefs, largely ignoring free (religious) speech rights: (*McClintock v Department of Constitutional Affairs* [2008] IRLR 29; *London Borough of Ealing v Ladele* [2010] 1 WLR 995 and *Ladele v United Kingdom*, Application No.51671/10 (2013) 57 EHRR 8; *McFarlane v Relate Avon Ltd [*2010] IRLR 872 and *McFarlane v United Kingdom*, Application No. 36516/10) (2013) 57 EHRR 8.

However, in *R (Ngole) v University of Sheffield* ([219] EWCA Civ 1127), the Court of Appeal decided that a university had acted unlawfully in deciding to expel a devout Christian student from a post-

graduate course after he posted comments on social media expressing his orthodox religious views about same-sex marriage and homosexuality. In that case, the Court decided that the University's decision was both procedurally incorrect and disproportionate to the student's Convention rights of free speech and religion. The Court concluded that the university's approach to the sanction was disproportionate because the views expressed were the appellant's religious and moral views, based on the Bible, and he had not been shown to have acted in a discriminatory fashion (and had stated that he would never do so). As there was no evidence that any service user had read the postings, or of any damage to the reputation of the profession, the conclusion that he needed to be removed from the course had not been demonstrated to be the least intrusive approach that could have been taken.

The decision in *Ngole* reopened the debate concerning the extent to which religious and personal views challenging equality and diversity can be voiced (particularly by those who owe a contractual or legal duty to promote equality and diversity). However, as we can see above, the Court of Appeal was able to distinguish *Ngole*, because in the present case P had made it perfectly clear that he would treat homosexuals differently when carrying out his public and contractual duties. It is clear, therefore, that cases such as *Ngole* and the present case are decided in the context of the responsibilities owed by employees or budding employees towards upholding principles of equality and diversity. Thus, unlike purely private citizens who wish to express their views on matters such as homosexuality or transsexuality (*R (Harry Miller) v The College of Policing and Another* [2020] EWHC 225 (Admin)), these cases are viewed differently as the individual has both a contractual and/or public duty to support the state and their employers in promoting equality and diversity.

Notwithstanding this, these cases do affect free speech and the right to hold and express religious and other views, and the law and judges must seek some compromise in order to accommodate the (religious) free speech rights of the speaker. Although the decision in *Ngole* is not direct authority on the extent to which the law allows such views to be expressed, some of the points made by the Court of Appeal on proportionality (of both the language used to express the view and the penalty imposed by the university) may have significance to a wider debate on free speech. Certainly, the recent EAT decision in *Forstater v CGD Europe* **(**[2021] 6 WLUK 104) suggests that such views do engage Article 9 and 10 Convention rights. In that case the EAT held that an employment tribunal had erred in holding that a "gender-critical" belief that sex was biologically immutable, and that sex rather than gender identity was fundamentally important, was not a "philosophical belief" protected under s.10(2) of the Equality Act 2010. In that respect the doubt expressed by the Court of Appeal in this case that the reason for dismissal was not to do with P's Convention rights, may have to be revisited, even if the sanction can be justified as proportionate on the facts.

With respect to employment law, *Page* adds to the growing jurisprudence on free speech and discrimination at work. Employers are left with a precarious balancing act. Employees have an absolute freedom to hold any belief or religion under Article 9. In this regard, employers should not discriminate purely on the basis of religions or beliefs held by applicants or employees (except in the very limited exceptions permitted in Schedule 9 of the Equality Act 2010).

However, the right to *manifest* religion or belief is subject to the limitations in Article 9(2), and the freedom of expression is subject to similar limitations in Article 10(2). Manifestation of belief may include stating those beliefs but also acting in a certain way based upon those beliefs. In *Page*, the office holder manifested his belief not only by expressing his beliefs, but also indicating he would act upon those beliefs in the way he performed his work roles. This had the potential to impact negatively on the employer's business and its relationship with its clients. In addition, and significantly, this particular manifestation of his beliefs would discriminate against those falling within other protected characteristics. Thus, in *Page,* the freedom of the employee to manifest his religious beliefs was lawfully curtailed by the employer in balancing the rights of the employee with the rights of others (the business and its clients) since the manifestation would itself lead to discriminatory conduct. In this regard, *Page* adds to existing authority (such as *Ladele, McFarlane,* above, and *Trayhorn v Secretary of State for Justice (*[2018] IRLR 502) that suggests an employer may take action against an employee where the employee's belief-based conduct discriminates against clients. Indeed, failure to take action

against such discriminatory belief-based conduct has the potential to give rise to claims by such clients against the business for discrimination in the provision of services under Part 3 of the Equality Act 2010. In addition, where the employer is a public authority, it is also under a duty to promote equality and so failure to act may breach its statutory duties (under Part 11 of the Equality Act 2010).

Neither freedom of expression, nor freedom of religion are absolute rights. Both may be limited in accordance with law and for the protection of the rights of others (Article 9(2) and Article 10(2)). In the employment arena, there may be various competing rights: the employer and the employee; between different employees; between employer and client; or between employee and client. Employers and employees have freedom to think and believe whatever they choose. Manifestation of belief may, and sometimes should, be restricted when protecting the rights of others. Simply stating your beliefs, without more, might not be subject to sanction. This would recognise and uphold Article 9 and Article 10. However, where the expression goes beyond a mere statement of belief, and impacts negatively on the business, or other employees, or clients, the employer may, and indeed sometimes should, be able to sanction employees for such conduct. While the parameters of freedom of expression in the employment context remain fact dependent, *Page* provides further support for employers in sanctioning employees whose belief-based conduct at work discriminates against clients.

What remains more problematic, is where belief-based discriminatory views are expressed by an employee (whether at work or outside work), but without impacting on the manner of performance of the job role. The expression of belief here may still impact on the business, by deterring clients, or on fellow employees, who may claim harassment. In *Page,* the employee was a senior figure of the employer and so public statements were more likely to impact negatively on the business and its clients. In *Wasteney v East London NHS Foundation Trust* ([2016] ICR 643) the Employment Appeal Tribunal upheld a disciplinary sanction against a Christian employee for inappropriately trying to impose her Christian beliefs on a junior Muslim employee. This went beyond a mere statement of her religious beliefs. Employers are under a common law duty of care to their employees which includes protection against other workers (*Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57) and which extends to their mental health (*Barber v Somerset CC* [2004] ICR 457). In addition, employers or employees who state discriminatory views themselves may face potential harassment claims under s.26 of the Equality Act 2010, whilst employers may face statutory vicarious liability under s.109 for expressions of such views by their staff. Employers may seek to address such issues by the inclusion of equality opportunity policies. The balancing act between freedom of expression and non-discrimination, however, is less obvious here. Whether simply stating a view is capable of amounting to harassment of another, may be fact dependent.

In addition to verbal expressions of belief, there are parallel debates on freedom of religion and expression through religious dress and appearance, and the imposition of dress codes at work. At EU level, a more secular approach appears to be finding favour with the Court of Justice seemingly permitting employers to adopt a policy of neutrality, subject to some provisos (most recently Joined Cases C-804/18 and C-341/19 *IX v WABE e.V; MH Müller Handels GmbH v MJ* (15 July 2021)). There have been numerous criticisms of and counter-arguments to this approach, including the suggestion that a diversity of beliefs within an organisation may achieve the same aim as neutrality of beliefs, in attracting a broad custom base, which would also allow for maintaining Convention rights under Articles 9 and 10. The United Kingdom has traditionally followed a more inclusive, multi-cultural approach to many EU countries, with the UK approach supported by more recent judgments of the European Court of Human Rights. There is no sign, as yet, of a similar approach of employers adopting a policy of neutrality in relation to verbal expressions of belief, or at least such cases are not coming before the domestic courts. A ban on any discussion of religion or belief at work in the interest of neutrality would raise further issues for consideration.

As confirmed in *Page*, however, an individual's freedom of expression, whether that expression occurs in or outside of the workplace, may be subject to some limits in the context of work. Employers will need to continue to seek to balance the freedom of expression for its employees to express belief-based views, including discriminatory views, with their own interests, and those of its clients, as well as other

employees. Such cases will remain fact dependent. The tipping point would include where such expression itself amounts to unlawful conduct. While in *Page,* the expression fell the wrong side of the balance, as seen in other cases, such as *Forstater,* the search continues for employers and courts alike, to establish the precise point of that fulcrum.

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STUDENT ESSAYS

HUMAN RIGHTS

Freedom of Expression and Religion: a Double-Edged Sword?

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Introduction

Freedom of expression under Article 10 of the European Convention on Human Rights (ECHR) remains an incontrovertible right within a democratic society, encompassing, *inter alia*, the fundamental aim to seek the truth.[1] Nonetheless, Article 10(2) stipulates that freedom of expression carries with it the duty to exercise it responsibly. This recognises that it takes place within the context of competing values including, but not limited to, freedom of religion, also an essential right under Article 9 of the ECHR. *Prima facie*, no conflict seems to exist; in fact, the two rights occasionally reinforce and complement each other and hence are raised collectively in some claims.[2] However, in the wake of the recurrent violence threatening social cohesion in some European countries, the liberal faith in the unquestionable value of free speech is disturbed, with questions surrounding the right to offend the religious sentiments of others against the rights of those practitioners to hold and manifest their beliefs in a pluralist society.[3]

This short article aims to explore the scope of free expression with regard to protected anti-religious speech and how it is distinguished from restricted hate speech under the Convention. Reference will be made to the approach of the European Court of Human Right (ECtHR) in making this distinction, with the author positing the question: would further restriction on freedom of expression in relation to attacks on religion be the answer to the deepening crisis surrounding this area,[4] or is the wide margin of appreciation administered by the courts in harmony with the spirit of pluralist democratic values that the Convention seeks to promote?[5] Furthermore, should the socio-political context of the targets of religious defamation influence the Court's decisions?

The approach of the European Court to Article 10 ECHR

Despite its fundamental nature, Article 10(2) encompasses codified restrictions on free expression, including grounds such as public safety, prevention of disorder, protection of morals and protection of the rights of others. Accordingly, freedom of religion is protected under both Article 9 and, indirectly, by the restrictions under Article 10(2). However, Article 9 distinguishes between the absolute right of *holding* religious beliefs (*forum internum*), and the conditional right of *manifesting* those beliefs (*forum externum*).[6] Academics note that "in any pluralist society where more than one religion is practiced, an intensified focus on protecting religions against defamation may…be counterproductive as far as the

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[1] *Lehideux and Isorni v France*, App No 24662/94, (1998).
[2] Davor Derenčinović, 'Freedom of Expression and Legal Protection of Religious Feelings in Europe: From Reconciliation to Complementarity', in *Law, Religion and Love: Seeking Ecumenical Justice for The Other* (2017) 194, 210.
[3] Rhoda E Howard-Hassmann, 'The Charlie Hebdo Murders and Freedom of Speech' (2015) 2 Indon J Int'l & Comp L 467.
[4] BBC, 'France teacher attack: Seven Charged Over Samuel Paty's killing' (22 October 2020) https://www.bbc.co.uk/news/world-europe-54632353 accessed 7 November 2020.
[5] *Lehideux and Isorni v France* (n. 1).
[6] Brett G Scharffs, 'The Freedom of Religion and Belief Jurisprudence of the European Court of Human Rights: Legal, Moral, Political and Religious Perspectives', (2011) 26 J.L. & Religion 249, 255.

right to religion…itself is concerned".[7] As a result, when one's religious sensitivities are insulted by another's anti-religious expression, this does not *ipso facto* violate the former's absolute right to religion under Article 9. Attempts to restrict speech in this regard would virtually always lead to a clash between the two rights whenever something remotely critical of that religion is expressed. There is also the danger of state abuse, with the potential persecution of "deviant" or "heretical" individuals and sects in the interest of safeguarding "pure" religious orthodoxy.[8] This is exemplified by contemporary reports of Sunni persecution in Shia-governed Iran on one hand and Shia persecution in Sunni-governed Saudi Arabia on the other; both carried out on the basis of protecting Islamic orthodoxy.[9]

Correspondingly, in *Handyside v United Kingdom*,[10] the Court championed the idea that Article 10 protected all speech, including those views that 'shocked' 'offended' and 'disturbed' the public. Nonetheless, early cases on free speech and religious sensitivity have engaged and favoured the limitations under Article 10(2) of "public order" and "the protection of the rights of others".[11] This jurisprudence specifies that 'protecting the right of others' creates for the speaker "an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus infringe on their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs."[12] This is in line with the 'spirit of tolerance' espoused by the Convention,[13] but raises difficulties in practice of distinguishing between acceptable and unacceptable speech in this area.

Analysing the margin of appreciation in religious speech cases.

The distinction so far is reasonably clear; propagating doctrines antagonistic to religion will be tolerated, except in cases where attacks against objects of religious venerations cause 'gratuitous offense'. The Court's approach in this regard has been subject to criticism, with some accusing the ECtHR of inscribing morality into the 'protection of the rights of others'.[14] This argument contends that the relativist nature of what encompasses immoral expression could render legal constraints on any expression counterproductive.[15] However, Vajda counter argues that 'the legitimate aim invoked in this context is principally not the protection of morals, but instead the prevention of disorder and protection of the rights of others.[16] She then adds that 'some academics hold that protecting religious feelings should not invoke public morals, as minority religions who are not representative of the general public's morals values would be unprotected.'[17]

The crux of this discussion is the dilemma of protecting free speech in the context of blasphemy laws. Thus, should free expression be restricted only when speech amounts to an abusive attack or, more broadly, whenever religious feelings are hurt as a result of provocative opinions? In *IA v Turkey*,[18] the Court held that no violation of Article 10 had occurred when the applicant had been fined for publishing a book, which, *inter alia*, alleged that the prophet Mohammed did not prohibit necrophilia and bestiality.

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[7] Jeroen Tempermann, 'Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech' (2011) BYU L Rev 729, 730.
[8] Ibid, 730.
[9] The Atlantic, 'Iran's Beleaguered Sunnis' (6 January 2016) < https://www.theatlantic.com/international/archive/2016/01/iran-sunnis-saudi/422877/> accessed 28 June 2021.
[10] *Handyside v United Kingdom*, App No 5943/72, (1976).
[11] *Otto-Preminger-Institut v Austria*, App No 13470/87 (1995).
[12] *Giniewski* v France, App No 64016/00 (2006).
[13] *Handyside (n. 10).*
[14] Patrick Wachsmann, 'La religion contre la liberti d expression: sur un arr~t regrettable de la Cour europeenne des droits de l'homme', *6 Revue Universelle Des Droits De L'Homme* (1994) 441.
[15] Tempermann (n. 7) 730.
[16] Maja Munivrana Vajda, 'The Right to Mock Ridicule and Criticise Religion- Exploring the Limits of Free Speech In A Democratic and Just Society' (2019) 55 Gonz L Rev 273, 278.
[17] ibid, 277.
[18] *IA v Turkey*, App No 42571/98 (2005).

Held to be beyond 'disturbing' and 'offensive', the allegations amounted to an abusive and unwarranted attack on the prophet, thus exceeding the boundaries of merely offensive expression. The Court stated:

> As paragraph 2 of Article 10 recognises, the exercise of that freedom carries with it duties and responsibilities. Among them, in the context of religious beliefs, may legitimately be included a duty to avoid expressions that are gratuitously offensive to others and profane… as a matter of principle it may be considered necessary to punish improper attacks on objects of religious veneration.[19]

Thus, state interference met a 'pressing social need' of protecting the rights of Muslims, rather than general morality.[20] However, the Court has established that religion itself is not exempt from criticism, in accordance with the tolerant and broadminded hallmarks of a democratic society. Thus, in *Tatlay v Turkey,*[21] the Court found a violation of Article 10 when the applicant was fined and their book, which claimed that Islam legitimized social injustices, was seized for a number of years. The Strasbourg Court held that, notwithstanding the offence caused to Muslims by the book's caustic commentary, the said commentary was not a sufficient reason to justify criminal conviction. The contrast here was that Tatlav's book did not employ a gratuitously offensive tone aimed at Muslims, nor did it attack sacred symbols (albeit being critical of some socio-political tenets of Islam). Furthermore, the threat of imprisonment facing the applicant was held to be disproportionate to the state's aim and would discourage writers from publishing non-conformist opinions and engaging in robust debates that characterise a democracy.

An initial examination of the European Court's 'hand's off' approach in these cases shows that despite the absence of a uniform European conception of the requirements of limiting expression that attack the religious conviction of others,[22] a potentially successful balancing act of protecting the rights of the religious from gratuitous offense while maintaining the freedom of others to criticise religions has been achieved by prioritizing which right is more valuable and weighty depending on the facts and the specific context.[23] This distinction may work theoretically, however, in light of the wave of violence in response to offensive caricatures of the Islamic prophet in France, coupled with the condemnation of the attacks *and* the cartoons by European Muslims, the practicality of this margin of appreciation and what it signals to religious minorities seems questionable.[24]

In evaluating the above cases, a trend of restricting speech offensive to the *de facto* majoritarian religions will be highlighted; thus, as epitomized in *IA v Turkey*, the fact that the overwhelming majority of society were active Muslim believers strengthened their argument for the pressing need to restrict speech that gratuitously offended the majority of the population.[25] Consequently, demographic figures played into the Court's balancing act even though the rights and safety of the majority could never realistically be undermined by speech; the majority did not suffer from hate crimes or religious persecution that would further be exacerbated by vitriolic speech.[26] It appears that the reverse argument of restricting speech targeting a vulnerable religious minority is more in line with the protective aims of the Convention.[27] Furthermore, the Commission's decision in *Choudhury v United Kingdom* highlighted this inconsistent and potentially discriminatory approach in this area.[28] In this case, the fact that the applicant belonged to a minority religion in the United Kingdom lessened his chances in law of

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[19] Ibid, para 29.
[20] Ibid, para 26.
[21] *Tatlav v Turkey*, App No 50692/99 (2006).
[22] *IA v Turkey* (n.18) para 25.
[23] Malcolm D Evans, 'From Cartoons to Crucifixes: Current Controversies concerning the Freedom of Religion and the Freedom of Expression before the European Court of Human Rights' (2010) 26 J L & Religion 345, 352.
[24] Savanta: ComRes, 'BBC Radio 4 Today Muslim Poll' (25 February 2015) < https://comresglobal.com/polls/bbc-radio-4-today-muslim-poll/> accessed 7 November 2020.
[25] Tempermann (n.7) 735.
[26] ibid.
[27] ibid.
[28] *Choudhury v United Kingdom*, 27949/95 (Commission Decision, 13 May 1996).

successfully seeking protection from gratuitous offense because the existing blasphemy laws only protected the Christian religion. This decision was subsequently upheld by the Court,[29] where it was held that there was no breach of Article 14 (prohibiting discrimination in the enjoyment of Convention rights) as the state had no positive obligation to apply the laws of blasphemy consistently. Thus, the discriminatory application of the law, enabled by a lack of uniformity within state practice, and the Court's broad discretionary scope, could create the scenario where easily exploitable blasphemy laws form the basis for restricting any form of critical expression; a scenario antithetical to that of a pluralist democracy.

Further, in *Otto Preminger Institute v Austria*,[30] the Court took into account the Catholic sentiments of 87 per cent of Tyrol's residents when making their judgment on the necessity of punishing anti-religious material.[31] In *Choudhury*, the Commission could equally have chosen to consider the demographics of British Muslims in supporting the restriction of the circulation of *Satanic Verses*. This evidence would have been clear, supported by the fact that decades after *Choudhury*, Muslims remain determined in taking legal complaints against religious insults to the Danish and French courts, in light of the publishing and republishing of the *Jyllands Posten* caricatures of the prophet which saw global protests erupt,[32] following the refusal of the Danish courts to indict the editors and cartoonists.[33] No Western jurisdiction has granted the applicants the redress they sought, and the ECtHR dismissed an international complaint about the Danish non-prosecution in *Jyllands Posten*.[34] Although it remains unknown what direction the Court would have taken had Danish Muslims made the claim, the precedent set by *Choudhury* of protecting offensive speech even towards minorities, coupled with the developing laws protecting blasphemy highlights the narrow chance of a successful application. The Venice Commission proposed that blasphemy, simpliciter, should not be deemed a criminal offence without the element of inciting hatred as an essential component.[35] Consequently, this highlighted a situation where a religious minority felt the speech that they found hateful and offensive was deemed permissible; thus, their deeply held interests and identities were less worthy of protection than others. This may have been exacerbated by contrasting the ECtHR's decisions that have repeatedly upheld legislative bans on racist hate speech,[36] on Holocaust denial,[37] and in one substantive ruling, a legislative ban on anti-gay speech,[38] as Keck elaborates.[39]

As noted by some academics,[40] the elements of protecting religious minorities, and considering expression deemed harmful, may have influenced the recent decision of the Court in *ES v Austria.*[41] In this case, the applicant, a far-right activist, alleged that certain actions of the prophet Muhammad were not compatible with European values, labelling him a 'warlord' and a 'paedophile' whose followers still acted by his example. The applicant was sanctioned under Article 188 of the Austrian Criminal Code

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[29] *Wingrove v United Kingdom*, App No 17419/90 (1996).
[30] *Otto-Preminger-Institut v Austria*, App No 13470/87 (1994).
[31] Thomas M Keck, 'Hate Speech and Double Standards' (2016) 1 Const Stud 95, 107.
[32] The New York Times, 'Italian quits over Cartoons; 15 die in Nigeria' (19 February 2006) < https://www.nytimes.com/2006/02/19/world/europe/italian-quits-over-cartoons-15-die-in-nigeria.html> accessed 28 June 2021.
[33] Keck (n31) 107.
[34] The applicant was from Morocco. The ECtHR held that the Moroccans' application was inadmissible because "there is no jurisdictional link between any of the applicants and the relevant member State, namely Denmark." *Ben el Mahi v Denmark*, App No 5853/06 (2006).
[35] Commission, 'European Commission for Democracy Through Law, Report on the Relationship Between Freedom of Expression and Freedom of Religion: The Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred' (October 23 2008) https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD accessed 6 November 2020.
[36] Balsytė-Lideikienė v. Lithuania, Application no. 72596/01 (2008).
[37] *Garaudy v. France*, Application no. 65831/01 (2003).
[38] *Vejdeland and Others v. Sweden*, Application no. 1813/07 (2012).
[39] Keck (n. 31) 110.
[40] Vajda (n. 16) 286.
[41] *ES v Austria*, App No 38450/12 (2018).

for 'disparaging… an object of veneration' and for 'arousing justified indignation'.[42] The ECtHR upheld this decision on the basis of its legality, legitimacy and proportionality.[43] In its view, protecting religious feelings corresponded with Article 10(2)'s aims of protecting the rights of rights and preventing disorder. It was noted that in this case, the statements generally casted the Muslim minorities under a negative light,[44] and could fracture the peaceful co-existence of religions by signalling to the minority that their prophet was a figure unworthy of veneration.[45] The judgment was subject to widespread criticism, that the Court took a more restrictive approach to 'protecting public order' than usual,[46] and simultaneously disregarded the developments of the last decades on attitudes to blasphemy by restricting 'unpopular' speech rather than protecting it even more from potential violent reactions.[47] Nonetheless, the wide margin of appreciation the Courts administered in this case favoured the intersectionality of more vulnerable minorities, and was more in line with the limitations of Article 10(2), as instead of protecting the sentiments of an overwhelming majority as illustrated in *Otto Preminger* and *IA,* the protection went to a more vulnerable minority. This judgment is persuasive when examined in the context of protecting minorities. If the Court's endorsement of the aforementioned bans on anti-Semitic, racist and homophobic speech legally signals a message of inclusion at the cost of free expression, then it would follow that upholding restrictions on speech Muslim minorities object to the most would also signal their equality in the eyes of the law.[48] Accordingly, the author is inclined to favour this outcome on the basis of its consistency.

More restrictions on anti-religious speech?

Notwithstanding its flexibility, the Court's wide margin of appreciation is criticized by some for upholding both an unconvincing and two-tier approach to free expression.[49] Certain 'hate speech' falls under Article 17, which rejects human right claims intended to destroy the right of others, purely on the basis of content, and thus having never enjoyed the protection of Article 10(1) to begin with. In an Article 17 context, the aforementioned 'balancing process' of the courts is completely eliminated as the content of the speech in question seeks to undermine the essential values of the Convention itself.[50] Thus, in *Norwood v United Kingdom*,[51] the Court found that the display of a poster conflating Islam with terrorism, alongside a demand to 'kick the religion out of Britain', was held to be a vehement attack on a religious group and hence incompatible with the values proclaimed and guaranteed by the Convention. It was immaterial whether a Muslim actually witnessed the poster and potentially became offended. Academics have emphasized that hate speech laws do not seek to protect people from offence, but rather from published assaults on their dignity and incitements of hatred that harm vulnerable minorities and, by extension, society.[52] However, it is argued that the distinction between unprotected religiously aggravated hate speech, as demonstrated in *Norwood,* and moderately protected

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[42] Ibid.
[43]Global Freedom of Expression Columbia University, 'ES v Austria' (October 25 2018) < https://globalfreedomofexpression.columbia.edu/cases/e-s-v-austria/> accessed 6 November 2020.
[44] See *Norwood v United Kingdom*, App No 23131/03 (2004) (holding that "a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace, and non-discrimination"). Page 4
[45] Global Freedom of Expression Columbia University, 'ES v Austria' (October 25 2018) < https://globalfreedomofexpression.columbia.edu/cases/e-s-v-austria/> accessed 6 November 2020.
[46] *Peringek v Switzerland*, App No 27510/08 (2015).
[47] Commission, 'European Commission for Democracy Through Law, Report on the Relationship Between Freedom of Expression and Freedom of Religion: The Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred' (October 23 2008) https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD accessed 6 November 2020.
[48] Keck (n. 31)105.
[49] Ibid, 110.
[50] *Norwood v United Kingdom*, App No 23131/03 (2004), 4.
[51] Ibid.
[52] Keck (n. 31) 98.

blasphemous speech, instanced in *Choudhury,* is reasonable in abstract, but unpersuasive when enacted into law.

If in upholding Article 17, the courts, criminalise religiously aggravated hate speech in cases where offence was not necessarily caused and public order remained undisturbed,[53] then the same approach could, and should, be taken with expression which Muslim minorities find the most hateful. This is illustrated by the aforementioned cases that demand legal regulation of blasphemous utterings and the unfortunate instances where religious radicals have been given a green light to react violently. This is particularly so given the argument that in a democratic society it is not cartoons which incite violence; but rather, the decision of someone else to react to free speech with violence.[54] Nevertheless, some consider that if a key goal of hate speech policy is to better integrate minorities into democratic societies by signalling to them that they are welcome as full and equal members, then it should be the members of those vulnerable groups who decide which speech is objectionable rather than solely European legislators and judges. It is argued, therefore, that the latter may not adequately attend to the understandings of the targets of hateful speech, while simultaneously making and upholding possibly counterproductive laws to 'protect their dignity'.[55]

To those who call for specific blasphemy restrictions, the unpersuasive jurisprudence and approach of the Court is further exacerbated by its contrasting, vigorously enforced approach to Holocaust denial, which is specifically prohibited under Article 17.[56] For some, hypothetical laws banning caricatures of the prophet seem closer to Holocaust denial than actual laws banning religiously aggravated hate speech.[57] The argument follows that if the basis of banning Holocaust denial is that it is a leading mode of contemporary anti-Semitism with no truth-seeking purpose,[58] then the same reasoning can be applied to banning caricatures of the prophet; as they are indeed a leading form of islamophobia with no truth-seeking value.[59] Additionally, if the aim of Holocaust denialism is to "nip Nazism at the bud, and stamp out its re-emergence through speech, symbols and public association,"[60] then caricatures that degrade and stereotype the prophet, and which fuel anti-Islamic sentiments towards his followers, should also be nipped in the bud, especially within a climate of growing hate crimes against Muslim minorities.[61] Gérard Biard, Charlie Hebdo's chief editor, once stated that people were "not supposed to use religion for your sense of identity, in any case not in a secular state".[62] Such a statement goes against the pluralist spirit of the Convention, notwithstanding the separation of religion from state, as religion is far from an individual's private matter, but rather a 'social construct with very specific social meanings that is entitled to certain forms of protection'.[63] Moreover, Biard's statement is juxtaposed with the ECtHR's emphasis on how religious beliefs are vital elements to the identities of believers in a democracy.[64] Thus, Biard identifying *Charlie Hebdo* as 'an atheist secularist paper' whilst maintaining that the view

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[53] *Norwood v United Kingdom* (n50).
[54] Howard-Hassmann (n. 3) 470.
[55] Keck (n. 31) 101.
[56] *Garaudy v France* (n. 37).
[57] Keck (n31) 110.
[58] *Giniewski v France* (n. 12).
[59] Keck (n. 31) 110.
[60] Michael J Bazyler, 'Holocaust Denial Laws and Other Legislation Criminalizing Promotion of Nazism', (25 December 2006) https://www.yadvashem.org/yv/en/holocaust/insights/pdf/bazyler.pdf accessed 7 November 2020.
[61] Collectif Contre L'islamophobie En France, 'Report 2020- Islamophobia in France' (2020) < http://www.islamophobie.net/wp-content/uploads/2020/09/RAPPORT-CCIF-2020-EN.pdf> accessed 7 November 2020.
[62] Andre Oboler, 'After the Charlie Hebdo Attacks: The Line between Freedom of Expression and Hate Speech' (July 2015) < https://www.researchgate.net/publication/281207438_After_the_Charlie_Hebdo_Attack_The_Line_between_Freedom_of_Expression_and_Hate_Speech> accessed 6 November 2020.
[63] Derenčinović (2) 209.
[64] *Kokkinakis v Greece*, App No 14307/88 (1993).

that others should not identify with their religion would seem like an imposition of the editor's own atheist identity on the rest of society.[65]

Nonetheless, flaws exist within the comparisons discussed above; the Holocaust is not a belief system, but a denial of historical facts that strips the dignity of the victims and their descendants. Considering that religious and racial persecution of Jewish people was the main reason for the ratification of the ECHR, then it is fundamental and inevitable to have an Article restricting anti-Semitism. One could argue that upholding the incessant mockery of Islam towards politically and economically fragile Muslim minorities is unjustified, especially when they have equally suffered at the hands of the French state and its colonial past.[66] However, Islam itself is a globally powerful institution. Bearing in mind the fundamental nature of free expression within the ECHR, the right to reasonably criticise and satirise dominant ideas holds more importance than the right of believers not to be offended, at least as a starting point. Moreover, if specific blasphemy laws were enacted by member states, they most likely would not fall under the "guillotine" provision that is Article 17, where all elements of proportionality are quashed and the state would not be required to show a pressing need for interference, merely that a religion was defamed.[67]

Conclusions

Upholding legislative bans on hate speech has the beneficial effect of communicating an inclusive message to vulnerable religious minorities but would be at the expense of curtailing the fundamental right to criticise and satirise religious ideas. Under the ECtHR's wide margin of appreciation, a balancing act exists between protecting offensive speech and protecting religion from gratuitous offence. However, this margin has often enabled the Court to approach clashes between freedom of expression and religion in a discriminatory and inconsistent manner. The practical solution to this conflict would be to utilise the margin of expression in an intersectional approach; thus, taking into consideration the socio-political standing of the target of said expression, as partly demonstrated in *ES v Austria*. This would allow the consideration of issues such as: the applicant's status in the society; the intention of the speaker and the status of their target; the general political and economic context (such as the possibility of an oppressive climate against a minority group; the manner of circulation and the potential impact of the statement); the form of expression, and the seriousness of the interference with freedom of speech.[68] Derenčinović summarises this succinctly by stating that 'the legal threshold for protection of religious feelings through criminal law is the determination of circumstances that degrade the respectability of a believer in the eyes of the others'.[69] In doing so, protecting the rights of all parties would precede the over-willing justification to protect the sensibilities of some of the gratuitous attacks of others.

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[65] The Atlantic, 'The Charlie Hebdo I Know' (11 January 2015) < https://www.theatlantic.com/international/archive/2015/01/charlie-hebdo-secularism-religion-islam/384413/> accessed 18 June 2021.
[66] Giles Fraser, 'France's Much Vaunted Secularism Is Not the Neutral Space It Claims to Be' (16 January 2015) https://www.theguardian.com/commentisfree/belief/2015/jan/16/france-much-vaunted-secularism-not-neutral-space-claims-to-be accessed 5 November 2020.
[67] Jean-Francois Flauss, 'The European Court of Human Rights and the Freedom of Expression' (2009) 84 Ind LJ 809.
[68] Vajda (n. 16) 288.
[69] Derenčinović (n. 2) 209.

LAND LAW

An analysis of Land Registration and Overriding Interests

Fu Zilou*

Introduction

The Land Registration Act (LRA) 1925 created a universal system of land registration in England and Wales. This system was strengthened by the LRA 2002 in a bid to produce a more conclusive system of registration. However, "overriding interests",[1] a category of unregistered interests to which registered titles are still subject, may represent "an obstacle to achieving a conclusive register, which is one of the principle objectives of the [LRA] 2002."[2] Accordingly, this article examines this statement by examining both the strengths and weaknesses of overriding interests and exploring the measures introduced by the 2002 Act to address the issues surrounding overriding interests and the conclusively of registration of land. The article will recommend an appropriate approach to ensure a balanced approach.

Conclusive register and the "mirror principle"

The land registration system introduced by the 1925 Act replaced the traditional "root of title" system and has several advantages.[3] In terms of economic benefits, it simplifies and confers certainty on land titles, thereby achieving "faster, cheaper and more reliable dealings".[4] In terms of trading security, it reduces the dangers faced by land purchasers and protects the registered rights of third parties.[5] To guarantee these advantages, this system is underpinned by the "mirror principle", which requires the land register to reflect the totality of rights and interests concerning a land title.[6] By virtue of this ideological principle, purchasers can rely on an accurate and conclusive "mirror" to ensure accuracy and transparency when purchasing land.[7]

The mirror principle lay at the foundation of the LRA 2002, whose fundamental objective was that the land register should present a "complete and accurate reflection of [land titles] at any given time"[8] - in other words, "a conclusive register".[9] This was to be achieved by generating a robust system of e-conveyancing, which requires land registration to *confer* title rather than merely describe it.[10] However, the existence of overriding interests has to some extent impeded the full realisation of this objective.

Overriding interests: a "crack" in the mirror principle

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[1] The LRA 2002 describes these interests as "interests which override".

[2] C Harpum et al, *The Law of Real Property* (8th edn, Sweet & Maxwell 2012), 151.

[3] Before the advent of land registration, the title of land was located in old-fashioned title deeds. Purchasers would check these documents and investigate "root of title", which was a complicated and expensive task.

[4] S Cooper, 'Equity and Unregistered Land Rights in Commonwealth Registration Systems' (2003) 3 Oxford University Common Law Journal 201, 201.

[5] S King, *Beginning Land Law* (Routledge 2015).

[6] P Richards, *Land Law* (Pearson 2014).

[7] M Dixon, *Modern Land Law* (7th edn, Routledge 2010).

[8] Law Commission and HM Registry, *Land Registration for the Twenty-first Century: A Conveyancing Revolution* (Law Com No 271, 2001) paras 1.5 and 2.24.

[9] Ibid para 1.10. See also Harpum et al (n. 2) 151.

[10] Law Commission and HM Registry (n. 8). See also *Creque v Penn* [2007] UKPC 44, para 13.

The LRA 1925 listed thirteen categories of overriding interests, which are unregistered interests that are binding on any individual who acquires an interest in the land, including registered land.[11] Consequently, overriding interests inevitably compromise the integrity of the mirror principle, representing a "crack" which encumbers the construction of a "trustworthy record".[12] This ultimately undermines the fundamental merits of conclusive registration under the mirror principle, such as efficient trading and high crediting. For example, the rapid growth of e-commerce in the United Kingdom highlights a recent variation in trading habits and social and technological support for the realisation of e-conveyancing.[13] This inevitably necessitates a more complete and conclusive system of land registration.[14] Moreover, the latitude in provisions on overriding interests may generate a flood of litigation and occupy a significant amount of judicial resources.[15] These concerns have led to much criticism of this category of unregistered interests, including calls for their complete abolition.[16]

Conversely, it has been argued elsewhere that abolishing overriding interests would be neither practical nor possible. For example, Dixon argues that it would be unrealistic to expect every title to be registered;[17] Bogusz opines that overriding interests afford protections to individuals who would be otherwise in a vulnerable position and therefore should be preserved;[18] and the Law Commission has described the notion of compulsory registration of all overriding interests as "unreasonable".[19] Moreover, the abolition of overriding interests might infringe the right-holders' peaceful enjoyment of land under the European Convention on Human Rights.[20] Concerns regarding the overriding nature of these interests could be addressed by land purchasers paying more prudent attention to inspecting the land, which could disclose such interests in many cases; for example, actual occupation.[21] This is supported by the "buyer beware" principle, whereby purchasers should conduct a reasonable examination of goods before purchasing, especially when buying valuables, such as land.[22] Accordingly, although the Law Commission rejected the idea of the total abolition of overriding interests, due largely to fear of "significant financial implications", [23] the 2002 Act endeavored to lessen their impact as a result of the above concerns.

LRA 2002: retaining the "obstacle"

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[11] LRA 1925, s.70(1). Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380) para 11.1.
[12] *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] EWHC 9 (Ch), para 15 (per Cross J).
[13] Law Com CP No 227 (n 2) paras 20.3-20.5. This Commission Paper highlights that there has been some progress in e-conveyancing in the area of mortgages and the development of technology.
[14] B Fisher, 'United Kingdom E-commerce 2019: Clicks and Bricks Are Important for Retailers Grappling with Brexit Effects' (*E-maker*, 27 July 2019) <https://www.emarketer.com/content/uk-ecommerce-2019> accessed 8 November 2020.
[15] M Dixon, 'The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment' (2003) Conveyancer and Property Lawyer 136.
[16] See, for example, Law Commission and HM Registry, *Land Registration for the Twenty-first Century: A Consultation Document* (Law Commission No. 254, 1998); G Dworkin, 'Registered Land Reform' (1961) 24 Modern Law Review 135.
[17] M Dixon *Modern Land Law* (n. 7).
[18] B Bogusz, 'Bringing Land Registration into the Twenty-First Century: The Land Registration Act 2002' (2002) 65 *Modern Law Review* 556. Gardner shares this view and posits that "people acquiring [overriding] interests will not normally know of any need or facility to register them…Given the state of the knowledge they have, they have no reason to think of consulting [a lawyer]" – S Gardner, 'The Land Registration Act 2002 – The Show on the Road' (2014) Modern Law Review 763, 774.
[19] Law Commission (n 16).
[20] Article 1 of the Protocol to the European Convention on Human Rights 1952 states: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions ..."
[21] Dixon, *Modern Land Law* (n. 7) 34.
[22] Bogusz (n 18) 558.
[23] Law Com No 254 (n. 16) para 4.24.

There are two sets of overriding interests in Schedules 1 and 3 of the LRA 2002, regulating, respectively, interests that override first registration and subsequent dealings.[24] As the majority of land titles in England and Wales have been registered to date,[25] Schedule 3, which deals with subsequent registration or dealings with the land, is more significant in terms of land transactions. Schedule 3 contains three main types of overriding interests: short-term lease,[26] actual occupation,[27] and certain easements.[28] Among these categories, actual occupation constitutes both "the most sweeping and the most often litigated" one.[29] However, its provisions have also left significant areas of latitude;[30] hence, it is important to clarify its constitutive requirements. Firstly, actual occupation overriding interests are enforceable proprietary interests. Accordingly, personal interests, such as licenses,[31] would not override under the principle that these interests do not bind purchasers, and such a provision is different from regulations concerning unregistered land.[32] Moreover, the interests should be enforceable. Therefore, a right which has been actually overreached,[33] or merely alleged through an unauthorised disposition,[34] would not bind a purchaser. Secondly, actual occupation should be present at the completion of disposition.[35] On the one hand, *Boland* states that actual occupation is a question of fact (physical presence),[36] and *Cann* requires such presence to "involve some degree of permanence and continuity".[37] This "permanence and continuity" could arise not only through the continuous physical presence of the third party,[38] but also other evidence, such as the regular parking of a car,[39] the presence of specific furniture and belongings,[40] and even through the presence of agents (or employees).[41] Furthermore,

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[24] However, the range of overriding interests in Schedule 3 is relatively narrower because "Schedule 3 operates ... when there is a transfer of land to a new owner and a primary aim of the LRA 2002 is to ensure that a transferee of a registered title is fully aware of as many adverse interests as possible..." – M Dixon, *Modern Land Law* (n 7) 59.

[25] Land Registry, *Annual Report and Accounts 2014/15* (Land Registry, 2015). This report revealed that there had been around 24.1 million registered titles covering 86% of land in England and Wales up to 2015, with this increasing with more instances of first registration.

[26] LRA 2002, Schedule 3, para 1: "A leasehold estate in land granted for a term not exceeding seven years from the date of the grant, except for [two certain situations]."

[27] LRA 2002, Schedule 3, para 2: "An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for [four certain situations]."

[28] LRA 2002, Schedule 3, para 3. This category refers to legal easements or profits à prendre that are not within the actual knowledge of the person to whom the disposition is made, or would not have been obvious on a reasonably careful inspection of the land over which the easement or profit is exercisable. Other categories include customary rights (rights that are enjoyed by all or some inhabitants of a particular area - Schedule 3, para 4), public rights (these rights are exercisable by anyone, including non-landowners, simply by reason of the general law - Schedule 3, para 5) and several "time-limited" overriding interests (paras 10-14) including franchises, manorial rights, rents reserved to the Crown, non-statutory rights in respect of an embankment and others. This final category of overriding interests have ceased to be overriding from 13 October 2014 (10 years after the enactment of the LRA 2002). The reason for this was because simple abolition of them might contravene the Human Rights Act 1998 in depriving the owner of their interest.

[29] Harpum et al (n 2) 203.

[30] N Jackson, 'Title by Registration and Concealed Overriding Interests: The Cause and Effect of Antipathy to Documentary Proof' (2003) 119 Law Quarterly Review 660.

[31] *Strand Securities v Caswell* [1965] EWHC 958, 979 (Ch),

[32] *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, para 1261, per Lord Wilberforce.

[33] *City of London Building Society v Flegg* [1988] AC 54.

[34] *Leeds Permanent Building Society v Famini* [1998].

[35] This notion mirrors that contained in s.70(1) g under the 1925 Act. See *Thompson v Foy* [2009] EWHC 1076 (Ch), Lewison J. See also *Link Lending Ltd v Bustard* [2010] EWCA Civ 1754.

[36] *Williams & Glyn's Bank plc v Boland* [1981] AC 487, Lord Wilberforce.

[37] *Abbey National Building Society v Cann* [1991] 1 AC 56, Lord Oliver.

[38] However, minors would "have no right of occupation of their own" - *Hypo-Mortgage Service v Robinson* [1997] 2 FLR 271, per Nourse LJ. This is because they are deemed to "be there as shadows of occupation of their own parent..." - *Bird v Syme-Thomson* [1979] 1 WLR 440, per Templeman J.

[39] *Kling v Keston Properties Ltd* [1983] 49 P & CR 212.

[40] *Link Lending Ltd v Bustard* [2010] EWCA Civ 1754.

[41] *Lloyds Bank plc v Rosset* [1989] EWHC 350 (Ch).

Chhokar[42] and *Tizard*[43] show that a temporary absence may not destroy actual occupation if the party has an ongoing intention to remain in the property.[44]

Moreover, although *Cann* maintains that actual occupation should exist at the completion of disposition,[45] *Thompson v Foy*[46] suggests that actual occupation needs to exist at the time of registration also. This lack of uniformity poses a problem as to the status of the overriding interest during this "registration gap", but the advent of e-conveyancing has the ability to address this. From the above, it is clear that these categories of overriding interests, especially those concerning actual occupation, have the potential to crack the mirror principle and present some challenges for purchasers.

LRA 2002: Lessening the "crack"

In response to calls for "a more expeditious and much less stressful [land registration] system",[47] the LRA 2002 needed to provide a much more complete "title mirror".[48] Thus, the Act endeavored to lessen the impact of overriding interests with rigorous scrutiny of their demarcation.[49] Firstly, it reduces the list of overriding interests in the 1925 Act, and correspondingly requires compulsory registration of more third-party rights.[50] For instance, equitable easements are omitted from the Schedules and no longer enjoy their previous overriding status.[51] Secondly, in order to reflect a more complete "mirror" image, the Act encourages applicants to disclose overriding interests of which they have knowledge.[52] Moreover, once that interest is registered, it cannot recover overriding status again.[53] However, although this is a "duty", it carries no sanction, which may pose some difficulties in practice.[54] Lastly, the LRA 2002 redefined several types of overriding interests, including short-term leases,[55] certain easements,[56] and actual occupation.

The redefinition of actual occupation was the most important measure among them. Firstly, the 2002 Act protects actual occupation as an overriding interest "so far as relating to land of which [the occupier] is in actual occupation".[57] This provision reversed the decision in *Ferrishurst,*[58] which held that actual occupation on part of a parcel of land might protect the whole unregistered interest. This ruling seems to place an unreasonably excessive "burden of inquiry" on purchasers.[59] Secondly, the LRA 2002 lay

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[42] *Chhokar v Chhokar* [1984] FLR 313. In this case, a wife who went into hospital for the delivery of her new baby was nevertheless considered to have an overriding interest due t
[43] *Kingsnorth Finance Co Ltd v Tizard* [1986] 1 WLR 783. In this case, a wife who visited the house regularly to look after her children still established an overriding interest based on actual occupation.
[44] However, if the absence is longer than "temporary", it may infer that there is a lack of "ongoing intention to remain in the property" - *Stockholm Finance Ltd v Garden Holdings Inc* [1995] NPC 162. In this case, an absence of fourteen months destroyed the claim of actual occupation.
[45] *Abbey National Building Society v Cann* [1991] 1 AC 56. This principle is also contained in the LRA 2002.
[46] *Thompson v Foy* [2009] EWHC 1076 (Ch), per Lewison J.
[47] Bogusz (n 18) 557.
[48] M Dixon, 'Protecting Third Party Interests Under the Land Registration Act 2002 - To Worry or Not to Worry: That is the Question' in M Dixon and G Griffiths, *Contemporary Perspectives on Property, Equity and Trusts Law* (1st edn, OUP 2007).
[49] Law Com No 271 (n. 8) para 2.25; Law Com No 254 (n. 16) para 4.14. It is a guiding principle of the LRA 2002 that "interests should be overriding only where it is unreasonable ... to be protected on the Register".
[50] M Dixon, *Modern Land Law* (n 7) 49.
[51] LRA 1925, s.70(1)(a).
[52] LRA 2002, s.71.
[53] Section 29(3) of the LRA 2002.
[54] M Dixon (n. 48).
[55] The qualifying period is reduced from twenty-one years to seven years.
[56] Dixon, *Modern Land Law* (n. 7) 66. In contrast to the 1925 Act, the 2002 Act excludes new equitable easements.
[57] LRA 2002, Schedule 3, para 2.
[58] *Ferrishurst Ltd v Wallcite Ltd* [1999] EWHC 355 (Ch).
[59] Harpum and others (n. 4) 204.

down the principle that undiscoverable occupation would not affect purchasers unless the purchaser actually knew of the interest at the time of disposition.[60] This reduced the extent of the overriding applicability of actual occupation from the LRA 1925, which had allowed both discoverable and undiscoverable actual occupation to override.[61] The test for "discoverability" is objective,[62] and determined by reference to the law on latent and patent defects of title.[63] As for the "exception", it occurs when the purchaser has "real knowledge" of the existence of the undiscoverable interest.[64] Such an exception seems fair,[65] but may lack practical effect due to the difficulty in proving "actual knowledge".[66] The final redefining of actual occupation within the 2002 Act is that an interest will not override when an inquiry was made to the right-holder and s/he failed to disclose the overriding interest "when [s]he could reasonably have been expected to do so".[67] This provision is a reformulation of its counterpart in the 1925 Act,[68] but it creates a new exception whereby the disclosure is not "reasonably expected".[69] The test of "reasonable expectation" is open to further judicial interpretation, although disclosure by a minor seems to be non-effective.[70] However, a dispute may arise where the occupier is unable to understand any inquiry due to mental incapacity.[71]

Overall, the LRA 2002 has provided balance to the law concerning overriding interests. This might be an appropriate approach because the more "conclusive register" is not always the better, due to the various justifications for overriding interests.[72] Moreover, the LRA 2002 aims to generate a more robust system of e-conveyancing, which needs to follow changing societal patterns and the development of technology.[73] Under such circumstances, its rules should show some degree of inclusiveness and foresight for unpredictable technological changes, and constantly adapt to them.

Conclusions

In conclusion, it is posited that overriding interests are indeed an obstacle to achieving a conclusive register. They constitute a crack in the mirror principle and hamper efforts at efficient trading and high crediting in relation to land transactions. However, there are justifications for preserving this category of unregistered interests, including the "buyer beware" principle and protection of vulnerable right-holders. It is submitted that the LRA 2002 reflects a balance between the concerns and the advantages of overriding interests by retaining many of these interests while lessening their impact through

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[60] LRA 2002, Schedule 3, paragraph 2(c)(i) and (ii). These provisions require 1) "actual occupation" to be "obvious on a reasonably careful inspection of the land at the time of the disposition", or 2) the protected interest to be within the "actual knowledge" of the transferee at that time. This "additional condition" as well as the another one about "inquiry", only appear in Schedule 3 of the Act.
[61] LRA 1925, s.70(1)(g).
[62] Dixon, *Modern Land Law* (n 7) 63. That is to say, the important question is whether a prudent purchaser *would have* discovered the occupation or not, instead of whether the purchaser actually discovered it or not.
[63] Law Com No 271 (n 8) paragraph 8.62. Plainly, such a test needs further judicial interpretation.
[64] *Mehra v Mehra* [2008] 3 EGLR 153, para 162, Judge Marshall.
[65] Dixon, *Modern Land Law* (n. 10) 64.
[66] See *Thomas v Clydesdale Bank Plc* [2010] EWHC 2755 (QB), para 49. This case holds that "actual knowledge of the facts which give rise to the alleged interest" would suffice. However, the principle of this case is doubted by Harpum et al (n 2) 205.
[67] LRA 2002, Schedule 3, para 2(b). It is noted that the inquiry should be made to the right-holder of the actual occupation instead of the vendor - *Hodgson v Marks* [1971] Ch 892, para 932, Russell LJ.
[68] LRA 1925, s.70(1)(g).
[69] Thus, non-disclosure will not necessarily destroy the overriding status in certain situations - see Dixon, *Modern Land Law* (n. 7) 65.
[70] *Hypo-Mortgage Service v Robinson* [1997] 2 FLR 271
[71] Such a dispute may have arisen if the inquiry had been made in the *Link Lending* case, whereby the occupier suffered from a mental illness.
[72] S Gardner, 'The Land Registration Act 2002 - The Show on the Road' (2014) *Modern Law Review* 763.
[73] Law Com No CP 227 (n. 2) para 20.11: "We will argue that the goals of electronic conveyancing need to be adjusted in response to the technical limitations that have become clear since the LRA 2002 came into force in order to provide a more realistic framework for a future electronic conveyancing system."

reducing their quantity and scope. For further balance, rules relating to overriding interests should be constantly adjusted in accordance with the development of electronic trading and e-conveyancing of land in England and Wales.

ARBITRATION

Paternalism and autonomy in international business and dispute resolution mechanisms

Wu Ziyan and Gao Aohan*

Introduction and Background

The aim of this article is to analyse the influence of paternalism and autonomy in different dispute resolution mechanisms, providing some guidance for participants of international commercial activities. This article is based on the model created by Schroeder and Pfitzner, comparing those commonly used mechanisms. In accordance with the research, mechanisms influenced more by paternalism would place emphasis on the fairness and enforceability of dispute outcome. However, for those dominated by the principle of autonomy, the flexibility and efficiency of procedure would have more priority. Therefore, it is significant for disputants to choose dispute-solving approach cautiously, based on their own demands.

As the scale of marketing constantly grows, business behaviours become more complicated. Domestic entities begin to cooperate with other institutions based in different countries, gradually exploring the international market. To ensure the success of business, it is necessary to stipulate diverse dispute resolution methods, providing an optimised business environment for parties in international transactions.[1] This article will examine how these commercial entities inform the different environments created by the relevant mechanisms, and how these mechanisms influence the business environment.

Through research on commonly used dispute resolution methods, it is clear that there are two co-existing but antagonistic concepts residing in these methods that influence the business environment. One is paternalism and in the legal context, it usually indicates that an authority is justified to interfere with the liberty of parties for reasons exclusively referring to welfare, justice or the interest of the parties.[2] In terms of dispute-solving mechanisms, this concept is manifested in the idea that there would be a neutral and authoritative entity intervening in the parties' dispute, making a relatively objective decision based on facts, which might then be against the intention of the parties. The other is autonomy, which usually means that parties own the liberty to freely deal with their own issues without any interference.[3] As for disputes arising in international business, autonomy means that parties in disputes would solve their issues via self-determination, which indicates that their consent and mind are the guiding principle of these mechanisms.[4] Generally, under an autonomy model, parties would achieve a consensual agreement eventually, reflecting their own ideas.

Depending on the different extent of influence caused by these two concepts, each dispute resolution mechanism has specific characteristics, creating diverse business environments for the parties in dispute. This article is into two sections. In the first section, it will analyse how paternalism and autonomy influence these commonly used mechanisms, evaluating their performance in dispute

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[1] Zhang Demiao and Zhao Jianya, 'The Practical Difficulties and Solutions of the Mechanism for Coordinating and Handling Foreign Complaints in View of the Business Environment under the Rule of Law' (2020) 8 China Legal Sci 48.

[2] R George Wright, 'Legal Paternalism and the Eclipse of Principle' (2016) 71 U Miami L Rev 194.

[3] Elias S Cohen, 'Autonomy and Paternalism: Two Goals in Conflict' (1985) 13 L Med & Health Care 145.

[4] Sarah Rudolph Cole, 'Managerial Litigants--The Overlooked Problem of Party Autonomy in Dispute Resolution' (2000) 51 Hastings LJ 1199.

resolution. In the second, it will assess the characteristics of these mechanisms, separately assessing the advantages and disadvantages of paternalism and autonomy in international business dispute resolution.

Commonly Used Dispute Resolution Methods

Based on the analysis of Goldberg and Sander,[5] as well as the research made by Schroeder and Pfitzner,[6] and complemented with relevant evaluation and comments of practical performance of these mechanisms, the extent of influence of these two concepts on a dispute-solving procedure is determined by its performance in different fields. This includes the flexibility and efficiency of procedure, long-term relationship establishment, and the fairness and enforceability of the outcome. In a procedure dominated by autonomy, it is inclined to be more flexible, efficient and easier for parties to build a further relationship. In contrast, in a procedure mainly influenced by paternalism, the fairness and enforceability of outcome has priority. This article will separately analyse each dispute-solving method in detail, illustrating how these methods perform in dispute resolution under the influence of paternalism and autonomy.

Litigation

Litigation is the process for handling disputes in the court system. Each or both parties can bring their claim to court, requesting that the judge be given summary power to make the binding decision and settle their dispute. This dispute-solving procedure is mostly influenced by paternalism. The judges own the authoritative power and make the final decision based on facts they discovered, instead of the expectation of parties.[7] This places emphasis is on the objectiveness of judgments and the fairness of the final decision, even if their decisions might cause some damage to one or both parties.

For instance, in practice, there is a doctrine of procedural due process, requiring an authority to enforce rules and regulations in a lawful manner.[8] Based on this doctrine, a comprehensive and strict rule system is set to regulate the litigation procedure, ensuring its fairness and integrity. However, these complicated rules also cause an increase in time and expenditure for the parties in dispute, showing low efficiency.[9] Meanwhile, in diverse cases the strictly regulated procedure is difficult to adapt to the needs of the parties. Its inflexibility might cause some unnecessary damage to innocent parties. Typically, in cases involving trade secrets, and in accordance with the requirement of litigation, parties have to disclose their trade secrets to the court for the decision by litigation, which might later be published to the public and cause potential risks for parties. Moreover, in common law systems, there is a strong adversary nature in the litigation. Parties are required to make their best arguments of their own position, weakening the opinions of the other party and strengthening their own viewpoints.[10] In order to obtain the decision in its favour, one party must outcompete the other in the court, creating an antagonistic relationship between both parties. Consequently, after litigation, there may be some obstacles for parties to re-establish further cooperation in the future.

Arbitration

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[5] Frank E. A. Sander and Stephen B. Goldberg, ‘Fitting the Forum to the Fuss’ (1994) 10 Negotiation Journal 53.
[6] Hans-Patrick Schroeder and Tanja V Pfitzner, 'Effective Conflict Management in Business-to-Business Disputes in Germany' (2013) 3 YB on Int'l Arb 327.
[7] Edward F McKie Jr, 'A Practical Look at Arbitration in Trade Secrets and Know How Cases' (1976) 18 PTC J Res & Ed 55.
[8] T R S Allan, 'Justice and Fairness in Law's Empire' (1993) 52 Cambridge LJ 64.
[9] Edward F McKie Jr, (n. 6).
[10] Susan M Leeson, 'Taming the Alternative Dispute Resolution Movement' (1989-1990) 3 J Contemp Legal Issues 101.

Arbitration is a non-judicial mechanism of dispute resolution, which is akin to a judicial settlement. There is a neutral third party making the decision, solving the dispute in a binding manner.[11] However, compared to litigation, the procedure of arbitration illustrates a lesser influence of paternalism, showing more respect towards the intention and wishes of the parties.

Arbitration is a consensual process; therefore, to initiate an arbitration both parties should achieve an agreement, showing their willingness to resolve their disputes via arbitration.[12] Meanwhile, the arbitration procedure is more flexible and changeable. Parties in arbitration have the freedom to decide procedural rules governing their dispute resolution, as well as the arbitrator and arbitration seat. It is also available for them to choose the date and venue of the hearing. They may even arrange the adjournment to suit their witnesses or themselves, creating greater convenience for their dispute resolution.[13] The informality and flexibility of procedure make arbitration more efficient, the flexibility of procedure helps parties save on cost and time, while the binding result gives a guarantee that they can enforce the final decision of the arbitrator.[14]

Moreover, as there is less antagonism than in formal litigation in arbitration, it is easier for the parties in this procedure to build further cooperative relationship in the future. In arbitration, unlike litigation, parties voluntarily enter into the arbitration process and jointly explore an approach to deal with their disputes.[15] Because arbitration is the result of common consent of both parties, parties are more like collaborators instead of competitors. It is an alternative to litigation without the adversary system. Parties do not need to be so aggressive to outcompete the other, and consequently there is a friendly bonding between both parties, providing them a possibility to have a further connection.

However, simultaneously, the emphasis on autonomy of parties vitiates the benefits brought by paternalism. The informal and changeable procedure causes arbitration to be less authoritative and fair. When parties are entitled to decide some processes in the arbitration, the arbitrator, the decider of the result, loses his summary power which is given to judges in litigation. He becomes a private individual owning expertise in dispute resolution, who has to consider more about the wishes of the parties instead of fairness.

Expert Determination

Akin to arbitration, expert determination is a non-judicial mechanism where a neutral expert makes a binding decision to resolve disputes. Nevertheless, unlike arbitration, expert determination only deals with technical issues.[16]

Expert determination is influenced by both autonomy and paternalism. On the one hand, the mind of the parties plays an important role in this mechanism. Expert determination is a contractual mechanism and to launch this procedure it needs the bilateral consent of parties in dispute. Meanwhile, like arbitration, the whole process is also flexible and simple, helping parties save great time and expense.[17] On the other hand, the emphasis on fairness and objectiveness is also evident in this mechanism. In this procedure, experts make a neutral assessment without reference to applicable law, and the final decision is based only on the facts.[18] Unlike arbitrators, these experts do not have immunity from liability,

[11] Michael Furmston and Jason Chuah, *Commercial Law* (2nd edn, Pearson 2013), 571.
[12] Arbitration Act 1996 (AA 1996), ss.5-6.
[13] Alan Redfern, 'Arbitration: Myth and Reality' (1976) 4 Int'l Bus Law 450
[14] Edward F McKie Jr, (n, 6).
[15] Susan M Leeson, (n. 10).
[16] Susan D Franck, 'A Survival Guide for Small Businesses: Avoiding the Pitfalls in International Dispute Resolution' (2004) 3 Minn J Bus Law & Entrep 19.
[17] Hans-Patrick Schroeder and Tanja V Pfitzner, (See note 5).
[18] Susan D Franck, (n. 16).

indicating that they should be responsible for their inappropriate decisions, which guarantees the fairness of outcome of expert determination. [19]

Similarly, as with arbitration, the expert determination also establishes an advantageous environment for parties to develop long-term relationships. As it is a procedure primarily dealing with technical disputes, there is little antagonism between the parties. However, even though decisions made by experts are binding, since there is no international enforcement regime, parties in international disputes may find it is difficult to enforce those results compared to arbitration awards.[20]

Mediation

Mediation is one of the alternative dispute resolutions (ADR) providing non-binding decisions, which illustrates the significant influence of autonomy.[21] In the process of mediation, a neutral third party named the 'mediator' will be invited or ordered to encourage the contentious parties to come to a compromise.[22] The mediator plays an evaluative role by expressing his opinions or holding separate discussions with the parties. However, the mediator is unable to determine the resolution of the dispute, which suggests that the conflicting parties remain in control of the decision. If the parties reach an optimal solution, a binding contract can be created, based on their settlement.

Compared to litigation and arbitration, mediation provides more flexibility as the intervention of the mediator is limited. Due to the flexibility and informality of this process, the expenses of the parties is also more affordable.[23] Moreover, mediation greatly respects the privacy and confidentiality of the parties, since there is no compulsory disclosure of the information or any detail of the parties and their issues.

Nevertheless, the result of mediation substantially depends on the mediator's skill and training, and the culture in which the mediation takes place.[24] Consequently, the fairness of mediation is not as promising as that of litigation. Further, there is a noticeable problem of interest contradiction. Wilson suggested that there are diverse and conflicting interests of the parties in mediation, who usually have different priorities. As a result, there could be potential difficulties in resolving the dispute without intervention of the neutral adjudicator.[25]

Conciliation

Conciliation refers to an ADR process that does not achieve a stable pattern. It is usually regarded as an interchangeable mechanism with mediation, where the parties in dispute use a facilitative third party, named 'conciliator', to facilitate the resolution of their dispute.[26] In comparison to the mediator, the conciliator makes a non-binding settlement proposal.[27]

Similar to mediation, conciliation offers substantial flexibility for the parities in dispute, bringing certain advantages. For example, the expenses are relatively low as the process is more simplified. Further, conciliation will cause less exposure of commercial information, protecting the privacy of parties and creating a preferable environment for establishing the long-term partnership. The main

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[19] Norman Palmer, 'Expert Determination' (1997) 2 Art Antiquity & L 204.
[20] Ibid.
[21] Indira Carr and Peter Stone, *International Trade Law* (6th edn, Routledge 2013).
[22] Michael Furmston and Jason Chuah, (n.11).
[23] Indira Carr and Peter Stone, (n. 22).
[24] Ronald E M Goodman, 'Conciliation, Mediation, and Dispute Resolution' (1996) 90 Am Soc'y Int'l L Proc 75.
[25] Denise Wilson, 'Alternative Dispute Resolution' (1993) 7 Auckland U L Rev 362.
[26] Indira Carr and Peter Stone, (n. 22).
[27] See David Ndolo 'The Role of the English Courts in The Enforcement of Arbitration Agreements' (2019) 24(1) Cov. J. L.J. 39.

difference between conciliation and mediation is that conciliation emphasises the facilitation of communications among disputants without providing recommendations from a third party.[28] As a consequence, the result of conciliation depends solely on the parties involved,[29] thus providing parties with more controlling power.

However, there is an issue in that conciliations are more likely to be invalidated, as each party can freely exit the process. Moreover, the parties seldom attach the same priorities to all objectives, and usually some objectives are left out by the other party. It is, thus, difficult to achieve a fair and bilaterally satisfactory agreement between parties.

Negotiation

Commercial negotiation is a type of dispute-solving method where parties can directly interact with each other without the interference of any third party. The initial expectations of each party are usually unrealistic and unattainable, although, under most situations it is possible for them to persuade each other to make compromises and modify their original position,[30] thereby achieving an acceptable final agreement.

The most significant advantage of negotiation is that among discussed mechanisms, it provides ultimate flexibility for the parties in dispute. In the process of negotiation, the autonomy of parties is in a dominant position. The parties choosing negotiation are able to agree on all aspects of the negotiation process, such as the place of negotiation, terms, modes, cost, etc. The negotiation process provides the parties without a neutral third party and accordingly the outcome is reached by the parties themselves. This is particularly advantageous in cases including sensitive information of the parties or those related to parties in a longstanding business relationship.

Nevertheless, correspondingly, the absence of an authoritative third party can result in the parties experiencing difficulty in reaching agreement, as they may be incapable of impartially assessing their own dispute. Moreover, it may encourage a party to attempt to take advantage of the other, particularly where the parties are of unequal commercial power. This possibly vitiates the fairness of the outcome.

Analysis of the alternation influence of paternalism and autonomy within different dispute-solving mechanisms

According to the model established by Schroeder and Pfitzner,[31] and comparison with those commonly used mechanisms, each dispute-solving mechanism is influenced by the concepts of paternalism and autonomy to a different extent. Although, as Cole points out, ADR mechanisms are based on the party autonomy model,[32] the concept of paternalism still exists outside the court's order. When the disputants decide to invite a third party to guide or assist them to solve their disputes, their freedom of self-determination is restricted to a different degree.

It is mutually beneficial for parties who are in dispute to notice the variations caused by the influence of paternalism and autonomy. First, with autonomy, the process of dispute resolution is simplified and becomes more dependent on the parties, which in turn provides more flexibility. Meanwhile, in terms of efficiency, comes cost and time effectiveness. There is a strong connection between these two factors: the longer the process lasts, the more expensive it becomes for the parties.[33] Among these mentioned mechanisms, efficiency increases when the autonomy occupies a more important position, where parties

[28] Michael Furmston and Jason Chuah, (n. 11).
[29] Srdan Simac, 'Conciliation - Alternative Dispute Resolution' (2006) 27 Zb Prav Fak Sveuc Rij 611.
[30] John Calhoun Wells and Wilma B Liebman, 'New Models of Negotiation, Dispute Resolution, and Joint Problem Solving' (1996) 12 Negot J 119.
[31] Hans-Patrick Schroeder and Tanja V Pfitzner, (n. 5).
[32] Sarah Rudolph Cole, (n. 4).
[33] Johan Gernandt, 'Cost and Time Effectiveness of Dispute Resolution' (2010) 3 Contemp Asia Arb J 199.

are inclined to choose a more simplified and flexible process. Thereby, efficiency is enhanced since those complicated issues can be handled in a more consensual way. For example, any cultural differences can be better resolved outside the court. As suggested by Gonzalez, the development of ADR not only increased the efficiency of legal systems in resolving disputes, but also reduced related administrative costs. As in ADRs, disputants would consensually ignore those time-consuming factors (e.g. the cultural differences) to more efficiently achieve an outcome of the dispute.[34]

Secondly, as the level of intervention from the third party diminishes, there tends to be less antagonism between the parties. Research carried out by Trinder and Kellett indicated that a negotiated solution rather than an imposed one was presumed to create less antagonism and to contribute in adjusting the outcome in order for it to be more acceptable to the parties.[35] It is thereby beneficial for the maintenance of any long-term relationship.

Despite the merits brought by the increase of autonomy, there are also non-negligible drawbacks. The reduction of third-party intervention makes the result of the resolution more dependent on the power and position of the parties. Norton addressed this issue, as there was a lack of traditional procedural safeguards including the rigorous procedures and decisions made by neutrals to ensure the fairness of their results.[36] She also stated there was an absence of generic measures or other criteria for assessing the quality of justice of ADR mechanisms.[37] Correspondingly, there is also a reduction of enforceability. As stated by Han and Poon, the law governing negotiation and mediation was relatively vague and the core principles applicable to non-arbitration agreements only concretised with the passage of time.[38] The business environment is thus tending to be more advantageous for the party with stronger bargain power as the absence of an administrative third party provides leeway to gaining extra advantage.

Therefore, in those mechanisms where paternalism plays a more active role, flexibility and efficiency are relatively defective due to complicated procedures or excessive expense. Nevertheless, they provide more security and fairness, and the enforceability are better protected compared to those mechanisms where autonomy is a more important consideration.

Conclusions

In today's international trade, there is a growing trend for internationalisation of market and business activities, which promotes commercial communications across the world. As a result, the participants in these commercial activities are facing more challenges, such as a more complicated business environment, the contradiction of different cultures, or the maintenance of state-to-state relations. Therefore, the likelihood of encountering commercial disputes has been increasing rapidly. How to find an appropriate method of resolving their disputes with respect to what that happened, or may happen in the future, has become a paramount concern for the parties involved in business affairs.

This article has considered six types of commonly used dispute resolution mechanisms: litigation, arbitration, expert determination, mediation, conciliation and negotiation. In the traditional court-based system litigation, each party can enjoy the most equitable dispute solution at the risk of the exposure of business information, worsening of their relationship and spending extra time or money. In order to avoid the potential problems that litigation brings, ADR mechanisms have become more and more popular in the field of international commerce. Arbitration has many similarities to litigation, yet its initiation must be consensually agreed by both parties. Expert determination is distinguished from arbitration in mainly two aspects: its scope covers only technical issues, and the third party can be held

[34] Alex Gonzales, 'Alternative Dispute Resolution' (2003) 32 Brief 4.
[35] Liz Trinder and Joanne Kellett, 'Fairness, Efficiency and Effectiveness in Court-Based Dispute Resolution Schemes in England' (2007) 21 Int'l JL Pol'y & Fam 322.
[36] Eleanor Holmes Norton, 'Justice and Efficiency in Dispute Systems'(1990) 5 Ohio St J on Disp Resol 207.
[37] Ibid.
[38] Keith Han and Nicholas Poon, 'The Enforceability of Alternative Dispute Resolution Agreements - Emerging Problems and Issues' (2013) 25 SAcLJ 455.

liable for their incorrect decisions. Although there is a strong resemblance between mediation and conciliation, the mediator plays an evaluative role by assisting the parties to come to a compromise, while the conciliator plays a facilitative role by promoting the communication of the parties so that they can resolve the dispute themselves. Negotiation is the most direct interaction between the parties and thus provides the most freedom in terms of self-determination. However, it also indicates the hiatus of fairness and enforceability due to the absence of an authoritative evaluator. These dispute resolution mechanisms are influenced, respectively, by paternalism and autonomy to different extents.

Understanding the characteristics of different dispute resolution mechanisms is significant in present commercial communications. If the parties are seeking a fast and economical solution that causes less damage to their relationship or information confidentiality, the mechanisms where the principle of autonomy is primary should be considered. On the other hand, if their purpose is to ensure the fairness or enforceability of the resolution process, the mechanisms dominated by paternalism is a more recommendable option. However, no one mechanism is perfect, as the negative influences of paternalism and autonomy co-exist simultaneously with their positive effects.

Dealing with frustration events in COVID-19: a comparison between Chinese and English contract law

Wang Xinrui, Chen Lanyi, Yang Yuhan and Li Muchun*

Introduction

The pandemic of COVID-19 has not only influenced the daily lives of people, but also the day-to-day operation of business sectors across the globe. It has virtually brought people's lives to a standstill and forced many enterprises to shut down for good. Having said that, even though the pandemic has had a great deal of impact on the business sector, as long as entities are not prevented from performing contracts the implementation of commercial actions should not cease. The core issue is how to overcome the influence of COVID-19 on the business contract domain. This article will firstly introduce the relevant principles in England and the People's Republic of China (PRC), respectively, then make a relative comparison between the causes and effects of these different legal principles in reality in both countries.

English contract law

In England, two methods deal with emergency incidents: *force majeure* clauses and frustration.

Force Majeure clauses

Force majeure is a French word which means 'the strength of God' and known in law as an excuse for the non-performance of contractual obligations.[1] It is rooted in Roman Law, and in recent times has been regulated by the French Civil Code.[2] It has also been widely adopted in civil law countries.

These clauses are commonly applied in commercial contracts, although there is neither a relevant provision for *force majeure* nor an independent conception of it in the English legal system. These terms are the product of contracts themselves; therefore, the circumstances of application as well as the effects are determined by the wording of the contract. It can be seen that English law respects the freedom of the contractual parties' intentions and acknowledges the validity of *force majeure* clauses. The law regulates *force majeure* clauses by interpreting the rules of contract under English law and applying these to specific situations.

In practice, in order to claim under *force majeure* clauses, parties need to prove three elements. First, that it was due to the unforeseen event that the party was prevented, delayed or hindered in performing its contractual obligations. Recent cases have stated that *force majeure* should be the only reason for the non-performance of the contract.[3] Secondly, the unforeseen event was out of the defaulting parties' control. Therefore, if accidents are caused negligently or deliberately, the clauses cannot be applied. Thirdly, defaulting parties cannot take any reasonable measures to avoid the consequences or the event.[4]

Frustration of Contract

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[1] Alphonse M Squillante and Felice M Congalton, 'Force Majeure' (1975) 80 Com L J 4.

[2] Robert Wilde '*A History of the Napoleonic Code (Code Napoléon)*' (ThoughtCo 2019) <https://www.thoughtco.com/the-napoleonic-code-code-napoleon-1221918> accessed 21 March 2021.

[3] *Maritime Inc. v Limbungan Makmur SDN BHD* [2019] EWCA Civ 1102; [2019] 4 All ER 1145.

[4] *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640 (Comm); [2019] 1 All ER (Comm) 34.

The concept of frustration of contract first appeared in the case of *Krell v Henry,*[5] and has been divided into three types: frustration of purpose,[6] impracticality, and impossibility.[7] In order to classify the way in which frustration is applied in England, attempts have been made by the judiciary to narrow down and clarify the law to stipulate specific types of situation that *cannot* be claimed for under frustration of contract. These are as follows: (1) where both parties have already agreed on ways to adjust contracts should an accident occur. For example, where this has been stipulated in *force majeure* clauses, exemption clauses and compensation clauses; (2) Where there are other approaches to fulfil the obligations when one of these have been hindered; (3) Where accidents merely increase the cost of performing obligations;[8] (4) Where accidents were foreseeable when the parties signed the contract;[9] (5) Where accidents are caused by the mistake of the party that claims frustration of the contract.[10]

The outcome of frustration of contract is the immediate rescission of the contract; it becomes void *ab initio*. Where contracts have been frustrated, the Law Reform (Frustrated Contracts) Act 1943 helps parties by allowing the recovery of money paid before frustration took place, specifically it allows: (i) parties to recover prepaid payments (paid before frustration took place), and be relieved of obligations to pay money which was due to be paid before frustration but had not yet been paid; (ii) in cases of part performance parties can retain expenses incurred up until frustration; and (iii) those parties who had benefited with a valuable 'non-money benefit' under the contract before frustration can be required to pay the other party a 'just' sum for it by the court even if money had not been paid.[11]

Comparison between *force majeure* clauses and frustration

First, in order for the doctrine of frustration to be applicable, parties are required to try to complete their existing obligations under the contract unless the frustrating circumstances make it impossible, illegal or radically different to the original objective of the contract. Conversely, the contractual terms of *force majeure* depend on the autonomy of both parties, and can be agreed according to varying situations and parties' degree of control over a specified event. Further, if the events should have been foreseeable at the time of signing the contract, it is impossible to apply the doctrine of frustration, although the parties can still claim under *force majeure*.

Overall, in practice, under the influence of strict adherence to the tradition of contracts under English law, most courts are extremely cautious in the application of contract frustration and *force majeure*.

Chinese contract law

When dealing with frustration events, in order to address the challenges Chinese Civil Law has regulated *force majeure* clauses and changes of circumstances in the Civil Code of the People's Republic of China (Chinese Civil Code). These are regulated mainly in Articles 180 and 194 of the Basic Provision book and Articles 533, 563, 590 and 832 of the Contract Book.[12]

Force Majeure

The earliest concept of *force majeure* in China can be traced back to the Tang Code Za Lv,[13] and the *force majeure* principle in the Chinese Civil Code is established on the basis of reference to the Japanese

[5] [1903] 72 LJKB 794 (CA).
[6] *Chandler v. Webster* [1904] 1 KB 493 (CA).
[7] *Howell v. Coupland* [1876] 1 QBD 258 (CA).
[8] *Tsakiroglou & Co v. Noblee Thorl G.m. b. H* [1961]1 Lloyd's Rep. 329 (HL).
[9] *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 921 (CH); [2019] 3 WLUK 649.
[10] *Czarnikow v. Rolimpex* [1978] 2 Lloyd's Rep 305 (HL).
[11] Section 1 Law Reform (Frustrated Contracts) Act 1943
[12] Civil Code of the People's Republic of China (中华人民共和国民法典).
[13] The main legislation of Tang dynasty (AC 618-907) of ancient China, including 12 codes in civil law, criminal law and administration law fields.

Civil Code and the German Civil Code.[14] Article 180 of the Chinese Civil Code stipulates that a party who fails to perform its civil obligations due to *force majeure* shall not bear civil liability, and Article 563 provides that the parties can terminate the contract if the purpose of the contract cannot be achieved due to *force majeure*.[15]

In the common definition of civil law countries, *force majeure* is an unforeseeable, unavoidable and insurmountable objective situation.[16] It requires subjective unforeseeability, while being objectively unavoidable and insurmountable. Subjective elements emphasise the unpredictability of the phenomena of *force majeure*, which is the key factor to judging whether parties have subjective faults. The objective circumstances that are "unforeseeable, unavoidable and insurmountable" are referred to in Article 117 of the PRC Contract Law.[17] Subject to an express duty to mitigate, all *force majeure* contractual provisions refer to events that come under this definition. The objective requirements highlight the practical elements such as the parties not being able to make arrangements or disposing of the event due to the occurrence of *force majeure* and events that are unavoidable due to this.[18] The unforeseeability of Covid-19 meant that parties could do little to mitigate circumstances especially during mandatory periods of lockdown.

Accordingly, in the relevant provisions of Chinese law, the following criteria needs to be met for the application of *force majeure*.[19] First, there must exist a *force majeure,* which means the circumstance is unforeseeable and insurmountable. Secondly, there must be a direct causation between the *force majeure* and the non-performance of the contract. Furthermore, the obligation nor the delayed performance cannot be exempted if the *force majeure* had already happened before the other party entered into the contract.

If all the conditions above are met, relevant provisions on *force majeure* can be applied and legal consequences such as termination of the contract, legal liability and limitation of action may arise or begin. Provided there are no legal exceptions, the liability of the party that did not perform its contract because of the *force majeure*, according to different influences, result in partial or total exemption. In such situations, there would be an obligation to inform the other party in time to mitigate the other party's losses and provide relevant evidence within a reasonable time. Meanwhile, the other party can terminate the contract in other situations where the purpose of the contract fails because of *force majeure*. Additionally, if the right of claim for contractual disputes cannot be exercised due to *force majeure* during the last six months of the prescriptive period, the period shall be suspended.

However, the law draws a clear distinction between circumstances falling within and outside the course of *force majeure*. Article 117 states that where *force majeure* occurs after a party has delayed performance, liability for breach of contract cannot be exempted.[20] For example, if a builder was delayed in starting work for a customer due to his own previous backlog and then Covid-19 occurred resulting in more delays, he would be liable for breach of contract as the *force majeure* occurred *after* his own delayed performance.

Change of circumstance

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[14] Liu Xinjiang, 'A literature review of the change of situation and force majeure' (2021) 10 Legality Vision 1.
[15] Civil Code of the People's Republic of China (n 12).
[16] Li Chengye, 'COVID-19 Epidemic and Force Majeure: From the Perspective of Chinese and English Laws' (2020) 2 Tendering & Management 35; Civil Code of the People's Republic of China (n 12): Article 180 saying that 'A force majeure means any objective circumstance that is unforeseeable, inevitable, and insurmountable'.
[17] Civil Code of the People's Republic of China (n. 12)
[18] Guo Yanghui '*The constitutive elements and judgment criteria of force majeure*' (Chinacourt 2014) <https://www.chinacourt.org/article/detail/2014/01/id/1172505.shtml> accessed 20 March 2021.
[19] Tan Qiping and others (ed), *The Chinese Civil Law* (Law Press China 2018).
[20] Civil Code of the People's Republic of China (n. 12)

Article 533 of the Chinese Civil Code stipulates the relevant contents of the principle of change of circumstances within the scope of PRC Contract Law.[21] It offers solutions to parties who face a dilemma (where they can neither exercise their right to terminate under Article 94(1) of PRC Contract Law nor be partially or wholly exempted from liability under Article 117(1) of PRC Contract Law),[22] but are merely suffering difficulties due to *force majeure,* but not to the extent that they cannot fulfil the contract. Article 533 removes the restrictive wording "not caused by *force majeure*" and "unable to fulfil the purpose of the contract from Article 26 of the Judicial Interpretation II of PRC Contract Law.[23] The party adversely affected will be allowed to request the other party to renegotiate or terminate the contract and relieve it from liability.

Where there is a substantial change to the basic conditions of the contract after its conclusion which, except for commercial risks, was unforeseeable by the parties at the time of concluding the contract, and making it obviously unfair for any of the parties to perform as originally stipulated, the party who suffers disadvantage may elect to renegotiate with its counterparty. Further, in the case of failure to reach a new consensus within a reasonable time period, the party who suffers disadvantage may bring a claim before the court or arbitral tribunal for modifying or terminating the contract. The court or arbitral tribunal then make a decision to modify or terminate the contract based on the actual circumstances of the case, in accordance with the principle of fairness.

To apply the principle of change of circumstance, the following conditions need to be met. First, there must be a change in circumstances. Second, potential changes occur after the formation of the contract and before the termination of performance. Third, the change of situation must be unforeseen by the parties and must be of an unforeseeable nature. Last, the performance of the original contract would make it undeniably unfair due to the change of situation.[24]

Comparison of *force majeure* and change in situation rules

Initially, both could constitute performance barriers, but the degree is varied. *Force majeure* constitutes a failure of performance, while the change of situation has not reached the extent of non-performance. When change of circumstance occurs, it is still possible to perform, but its performance is extremely difficult and leads to inevitable injustice.

Additionally, the legal result of these two rules is different. *Force majeure* is a reason for legal exemption of contracts. The parties need only to prove the contract could not be performed due to *force majeure* and the court has no discretion. On the contrary, the change of situation is not a reason for legal exemption, its essence is to enable the parties to enjoy the right to request a change or termination of the contract, and grant the courts the power of fair discretion.

For frustration situations caused by COVID-19, the Supreme People's Court of Issuing the Guiding Opinions (Part I) on Several Issues of Properly Hearing Civil Cases concerning the COVID-19 Pandemic regulated that:

> A party that fails to perform a contract due to the pandemic or pandemic prevention and control measures shall, subject to the provisions on *force majeure*…If a party only feels it difficult to perform a contract due to the pandemic or pandemic prevention and control measures, the parties concerned may re-negotiate the contract; and if the parties can continue

[21] Civil Code of the People's Republic of China (n. 12), article 533 states: 'Where the basic conditions of a contract undergoes a material change unforeseeable by the parties at the time of contracting which is not a commercial risk after the formation of the contract, rendering the continuation of the performance of the contract unconscionable for either party, the adversely affected party may renegotiate with the other party; and if the renegotiation fails within a reasonable time limit, the party may request the people's court or an arbitration institution to modify or rescind the contract.'
[22] Ibid.
[23] Ibid.
[24] Wang Liming and others, *Civil Law* (Law Press China 2020).

> performing the contract, the people's court shall strengthen efforts in mediation and actively guide the parties to continue the performance. The people's court shall not support a party's request to dissolve the contract due to difficulty in performance. If continuing performing the contract makes it obviously unfair to one party, and the party requests to change the performance period, performance method or price of the contract, the people's court shall, based on actual conditions of the case, decide whether to support such a request. If, after the contract is changed, the party still claims the application of partial or whole liability exemption, the people's court shall not support such a claim. If a party requests to dissolve the contract because the purpose of the contract cannot be achieved, the people's court shall support such a request.[25]

It can be seen that in the face of contractual difficulties caused by COVID-19, the Supreme Court does not directly decide to apply one of the *force majeure* or the change of circumstance, but the mixed application of these two. Only in the circumstance that the performance is prevented by the pandemic completely, can the *force majeure* be applied. Additionally, the Guiding Opinions of some High Courts, such as the High Court of Zhejiang Province, tend to forbid the application of *force majeure* and situation change when the delayed performance of the main contractual obligation had taken place before the outbreak.[26]

That signals that the Chinese government would like to adopt a result-oriented thinking. It prevents the abuse of *force majeure* through strict application of the conditions of legal termination of contracts and, at the same time, implements the principles of fairness and balance of interests to all parties to the contract. This may help to encourage trading, and safeguard trading order and transaction expectations. Although this still avoids dealing with the hazy problem existing in Chinese judicial practice in the long-term of the scope of the application of *force majeure* and change of situations,[27] this notice will undoubtedly promote the implementation of the contract affected by the epidemic to the greatest extent. It is conducive to the economic recovery and order maintenance in the post-pandemic era and is the concrete embodiment of the principle of good faith in Chinese civil law.

A comparison of English and Chinese contract law

Similarities

The similarities between English and Chinese Contract Law relating to frustration events mainly lie in two aspects. Firstly, there are rules on *force majeure* in the laws of both countries. Secondly, there is no regulation on the bearing of losses. Therefore, in the current situation, a possible method of dealing with the contractual loss caused by the pandemic might be to refer to the relevant contractual agreement between the two parties; or to look at the relevant legal provisions in situations where there is no appointed resolution in contracts.

Differences

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[25] Notice by the Supreme People's Court of Issuing the Guiding Opinions (Part I) on Several Issues of Properly Hearing Civil Cases concerning the COVID-19 Pandemic (最高院关于依法妥善审理涉新冠肺炎疫情民事案件若干问题的指导意见一，法发（2020）12号，2020年4月16日发布) , article 3.

[26] Notice of the Second Civil Trial Court of Zhejiang Provincial High People's Court on the Issuance of the 'Answers to Several Issues on the Trial of Commercial Disputes Related to the COVID-19 Pandemic' (浙江省高级人民法院民事审判第二庭关于印发《关于审理涉新冠肺炎疫情相关商事纠纷的若干问题解答》的通知，浙高法民二（2020）1号，2020年2月13日发布), article 4.

[27] Chen Baixiang, 'The source and application of force majeure and situation change principle' (2012) 3 Lanzhou Academic Journal 211; Zhang Pinghua and Wang Hui, 'The integrated response mechanism of "force majeure / situation change" in the context of COVID-19' (2020) 13 Journal of Law Application 100; Liu Xinjiang (n. 14).

English law has not formed a complete system of *force majeure* and only has strict law regulation concerning frustration. Conversely, the Chinese Civil Code has detailed written regulation of the applicable conditions, the consequences of legal rights, and notification and derogation obligations of *force majeure* and change of situations. There are also further regulations in typical chapters such as the 'Transport Contracts'.[28] Moreover, for applicable conditions, English law does not require unpredictability of events for *force majeure* to apply, whereas Chinese law does. Furthermore, there are differences in the legal consequences for the institution dealing with frustration. English law does not give rights to one of the parties to terminate the contract when there is *force majeure,* but contracts are terminated immediately and automatically under the application of frustration. Conversely, the Chinese Civil Code gives legal rights of negotiation and terminating contracts with no liability. Whether the contracts are finally terminated or not depends on the degree of intervention of the accident, the results of negotiation between the two parties and the decisions of the courts or arbitration body, rather than being terminated immediately.

The two countries have different preferences in their approaches. The application of *force majeure* in English law is attributed to the region of party autonomy. Frustration is regulated strictly and the legal consequences are more direct. The main purpose is to restrict the application of the rule. However, Chinese civil law is more relaxed in the area of *force majeure* and changes of situations. Legal consequences are more focused on improving the possibility of continuing the performance of contracts. Contracts can be voided only if the performance of contractual purposes have become totally impossible. It aims to maintain the existence of contracts and propel and encourage performance.

Comparative analysis using a real case scenario

In this section we will examine the case of *Bank of New York Mellon Ltd v Cine-UK Ltd.*[29] The tenant leased the premises to the claimant for his own commercial activities. Unfortunately, the COVID-19 occurred during the period of the contract and due to new regulations coming into force in response to the pandemic, the tenant was forced to close his premises to the public and was unable to trade for a period of time. The tenant claimed that the contractual terms of the original lease were invalid on the grounds that the store could not be used as it had been prior to the pandemic due to the unforeseen COVID-19. The lease suffered setbacks and it was claimed that the rent should be set aside due to these circumstances.

In the contract, the terms were in standard form. Each of them contained a rent cesser clause, which was worded slightly differently in each case, but all were to the effect that if access to the property is destroyed or damaged by specified insured risks so as to render the property unfit for occupation or use, then the basic rent should be suspended. In addition, the government issued the Code of Practice, which strongly encouraged commercial landlords and tenants to renegotiate specific terms for contracts, including rent-free periods.

In this case, applying English contract law, the argument of the tenants was rejected by the court. For rent cesser clauses, the court held that the 'consistency principle' applied and the rent cesser clause was not triggered here.[30] The Code was expressed as voluntary and found to be outside the proceedings; the Code clearly stated that tenants who are able to pay their rent should do so and that tenants should be liable for payment under the tenancy unless they renegotiated. With regard to frustration of contract, the court held that the effect of frustration would be to discharge or end a contract, and in the circumstances, there was no 'temporary frustration'.[31] In conclusion, the court upheld the landlord's right to collect the rent.

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[28] Civil Code of the People's Republic of China (n. 12)
[29] *Bank of New York Mellon (International) Ltd v Cine-UK Ltd* [2021] EWHC 1013 (QB); [2021] 4 WLUK 233.
[30] Ibid.
[31] Ibid.

However, the result of this case might have been different if the case followed the Chinese Civil Code. The court may have encouraged the parties to renegotiate the relevant terms. Then, if the landlord refused to renew the agreement, the contract may have been terminated. According to the principles of *force majeure* and the opinions of the Supreme Court, COVID-19 would not necessarily guarantee the invalidation of the contract in this case. The court would be required to consider the impact of the pandemic on different regions and industries, as well as the causative link between the pandemic and the practical difficulties in fulfilling the performance of obligations.[32] For tenants and landlords, COVID-19 does not result in failure of performance in that the leased store can still be moved into, decorated and used, and the objective requirements for applying the principle of *force majeure* have not been met. Therefore, based on the guidance of the Supreme Court of China, the principle of *force majeure* does not play a role here.

From the perspective of the change of circumstances principle,[33] the tenant in the case could have made important changes based on the actual situation, and requested for a revision of the rent and other clauses directly affected, or indeed the termination of relevant clauses. In response to the impact of COVID-19, the government could have forced the store to close. This would have led to significant changes in contractual situations between landlords and tenants. Clearly, it would be unfair for the tenant to be forced to continue performing the contract when circumstances made it impossible, and the tenant would be able to request a negotiation to amend the affected terms, arguing the occurrence of change of circumstance. If the negotiation failed, the parties would have the option to request the court to pass judgment to end the contract.

Conclusion

This article has introduced the relevant rules of frustration events in English Law and Chinese Law respectively. In England, where *force majeure* clauses have been added to agreements in contracts, it can be applied accordingly. If there is no such agreement, another possible method is to apply the frustration rule, which requires that the fundamental purpose of the contract is impossible to achieve due to the frustrating event. Conversely, in China, *force majeure* and change of situation are written in the Civil Code to deal with the contractual problem resulting from frustration events. If there is absolutely no way of continuing the performance, no civil liability arises therefrom and the parties are able to rescind the contract. In such cases, parties are required, in a timely manner, to notify the other party with proof, so as to mitigate the possible loss caused to the other party. If performance is still possible but difficult to conduct, the parties could renegotiate to change some terms of the contract or ask the courts to dissolve the contract when the fundamental purpose of it is impossible to be reached. Therefore, it can be seen that despite identical circumstances the results would most likely be entirely different in England compared to China, due to the flexibility and applicability of the respective laws.

[32] Notice by the Supreme People's Court of Issuing the Guiding Opinions (Part I) on Several Issues of Properly Hearing Civil Cases concerning the COVID-19 Pandemic (n. 25).
[33] Civil Code of the People's Republic of China (n. 12)

TORT

Tort and psychiatric injury

Wang Xinrui [*]

> "The law on nervous shock or psychiatric injury is so illogical that only Parliament can come up with a solution". – *White v Chief Constable of South Yorkshire Police* (1999)

The English law of psychiatric damage is described as "in a dreadful mess"[1] and legislative solutions have been suggested to Parliament.[2] This essay will demonstrate that the current law on psychiatric injury defies logic to some extent, but that the statutory approach is not the exclusive way to solve the problem. First, the essay will briefly introduce the legal rules in the area of psychiatric injury, followed by an evaluation of its logic and rationale. In the final part, it will suggest that the legislative method is not suitable to solve all the problems and what may be needed is the combination of common law and statutory regulation.

Introduction to the rules on psychiatric Injury

Psychiatric injury - traditionally called "nervous shock"[3] – first became actionable in the early twentieth century.[4] The requirement for successful claims appeared to show a relaxing tendency in the 1980s,[5] and then tightened ten years later in *Alcock v Chief Constable of South Yorkshire Police*.[6]

Today to claim psychiatric injury, the claimant should firstly confirm a psychiatric illness[7] as the standard of ICD-10.[8] Additionally, victims are divided into primary and secondary categories. Primary victims are physically injured or believe they would have a foreseeable physical injury,[9] and, therefore, suffer emotional trauma. On the other hand, the requirement of proving a person as a secondary victim is much stricter. It should be demonstrated that the psychiatric illness is caused by the "sudden terror"[10] of witnessing an event or its aftermath to a person who is of normal fortitude.[11] Furthermore, there are three control mechanisms applied to determine whether the duty of care exists: proximity of relationship, time or space, and perception.[12]

Some illogical aspects of the rules

Initially, as a prerequisite of claiming psychiatric injury, the requirement of recognised psychiatric illnesses is arbitrary and contradicts medical science. In fact, the judgment of psychiatric diagnosis relies significantly on the clinical phenomena.[13] Therefore, there is no bright line between psychiatric diagnoses and grief. Further, this distinction appears meaningful for the medical care decision only, and

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[1] S Todd, 'Psychiatric Injury and Rescuers' (1999) 115 LQR 345, 349.
[2] Law Commission, *Liability for Psychiatric Illness* (Law Com No 249, 1998).
[3] *Attia v British Gas plc* [1987] 3 All ER 455 (CA), 462.
[4] *Dulieu v White and Sons* (1901) 2 KB 669 (KB).
[5] John Cooke, *Law of Tort* (12th edn, Pearson 2015), 65.
[6] [1991] 4 All ER 907 (HL).
[7] John Cooke (n. 5), 66.
[8] World Health Organisation, *International Statistical Classification of Diseases and Related Health Problems* (10th, WHO 1983).
[9] *Page v Smith* [1996] AC 155 (HL).
[10] *Alcock* (n. 6), 918.
[11] *Page* (n. 9).
[12] *Alcock* (n. 6), 907.
[13] J B Williams and others, 'The Structured Clinical Interview for DSM-III-R (SCID) II: Multi-Site Test-Retest Reliability' (1992) 49 AGP 630.

irrelevant for assessing the affect in tort.[14] Likewise, considering the different behavioural manifestations and dysfunction of individuals, some aspects of intense suffering are not regarded as illness.[15] Therefore, it is suggested that it should be the severity of emotional pain rather than psychiatric illness that matters when considering the psychiatric damage.

Furthermore, the division and different treatment of primary and secondary victims seems unjust and irrational. It appears to place secondary victims in the passive and peripheral position leading to them being "less deserving of compensation".[16] However, in some circumstances, secondary victims could be directly and closely affected by the defendants' actions and suffer as severe emotional pain as primary victims. A typical example is where a mother witnesses the death of her children.[17] Additionally, the division rule may trap the court into a dilemma. For instance, in *White v Chief Constable of South Yorkshire*,[18] the court refused to categorise the rescuers as primary or secondary victims. Therefore, although the four officers were suffering from the psychological effects of witnessing death and injury, they failed to claim for that psychiatric injury. Simply, the compulsorily classification of victims into two categories may be not necessary and fails to judge the level of mental injury appropriate in some situations.

Moreover, the control mechanisms of claiming secondary injury are inflexible and defective. Initially, it should be the circumstance and the length of exposure to the event which determines the trauma.[19] Further, the psychiatric reaction may develop over time because of the reflection.[20] Accordingly, the "sudden shock" criteria appear to be arbitrary. At the same time, the three proximity tests may be rigid and unfeasible in reality. First, it is inaccurate to judge the closeness between individuals according only to the superficial or legal relationship.[21] Second, the proximity of time and space standard may require the winning of "a race between the claimant and the ambulance."[22] It denies the psychological injury raised after the event and immediate aftermath, notwithstanding the distance between the individuals.[23] It also ignores the greater trauma of the bereaved relatives who did not have an opportunity to view the corpse.[24] Third, the exclusion rule towards victims informed by the third party lacks scientific evidence,[25] and appears outdated in this technological era.[26] It should be the negative emotion caused by events that mattes, not just the physical presence.[27] Overall, adjustment and improvement are needed in the area of testing secondary victims.

Reforming the rules?

Because of the legal shortcomings mentioned above, some argue that the law in this field should be fully codified[28]. However, a wholly statutory reform might not be a sensible option. The inflexibility of

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[14] Jyoti Ahuja, 'Liability for Psychological and Psychiatric Harm: The Road to Recovery' (2015) 23 MLR27, 38.
[15] R McNally, *What is Mental Illness?* (HUP 2011), 26.
[16] H Teff,' Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries' (1998) 57 CLJ 91, 114.
[17] M A Jones, 'Liability for Psychiatric Illness—More Principle, Less Subtlety?' [1995] WJCLI 258, 259.
[18] [1999] 2 AC 455 (HL).
[19] *Frost v Chief Constable of South Yorkshire Police* [1997] 3 WLR 1194.
[20] Law Commission, *Forty–Fourth Annual Report* (Law Com No 323, 2010), 5.39.
[21] Catherine Elliott and Frances Quinn, *Tort Law* (11th edn, Pearson 2017), 116.
[22] Lumney and Oliphant, *Tort Law* (3rd edn OUP 2008) 347.
[23] *McLoughlin v O'Brien* [1982] 2 All ER 298 (HL).
[24] J W Worden, *Grief Counselling and Grief Therapy: A Handbook for the Mental Health Practitioner* (3rd edn 2005).
[25] H Teff 'Recovery for Psychiatric Injury by Report: Another Small Step Forward" (1996) 4 TLR 96, 101.
[26] *Jaensch v. Coffey* (1984) 155 CLR 549 (HC), 608.
[27] Teff (n. 16), 110.
[28] *White* (n. 18), 500.

legislation and the development potential of common law prove the necessity for judicial precedents in this area.

To address unsatisfactory aspects in this area, more feasible and reasonable approaches might be more efficient to evaluate the claimants' psychiatric injury. For example, it could be practical to replace the current division of primary and secondary victims with the foreseeability of serious psychiatric harm.[29] Similarly, to change the threshold of claiming psychiatric injury from a recognised psychiatric illness to the severity of psychological impact has been suggested.[30] On the other hand, codifying the requirement of establishing psychiatric injury may lead to an increase in inflexibility and encourage a lack of logic.

Besides, evolving judicial decisions in this area could promote the development of legal theory concerning psychiatric injury and improve the ability of the law to face complex cases. On the contrary, the statute may not follow the advance in both medical and legal understanding.[31] Take the proximity of relationship limitation as an example. If the legislation is applied, there would be a "fixed list"[32] of relatives who are legally regarded as having the close relationship with the primary victims. However, this would be unfair to those who raise an intimate tie of love and affection to the claimants just after witnessing the event.[33] Additionally, the psychiatric injury of some particular groups, such as rescuers and bystanders, needs more support from the courts from various perspectives.[34] Overall, the development of the common law would provide a better incrementally improved chance for an effective law of psychiatric injury.

Conclusions

In conclusion, this essay has outlined the law about psychiatry injury and identified three main illogical rules: the prerequisite of claiming this injury, division of primary and secondary victims as well as the control mechanisms. Finally, it is argued that compared with unified statutes, estimating psychiatric injury via common law methods could be the more preferable choice.

[29] *Page* (n. 9).
[30] Jyoti Ahuja (n. 14), 78.
[31] JZ Sadler, *Values and Psychiatric Diagnosis* (OUP 2005), 169.
[32] Vivienne Harpwood, *Modern Tort Law* (17th edn, Routledge Cavendish 2009).
[33] Law Commission (n. 2).
[34] Ibid.

STUDENT CASE NOTES

Aisha Shakeel Qureshi

Depp v Newsgroup Newspaper Ltd [2020] EWHC 2911 (QB)

Introduction

The case of *Depp v Newsgroup Newspaper Ltd* concerned an allegation of libel by the media against a prominent actor and celebrity. In this case, the court ruled that it was lawful for the media to refer to someone using adjectives such as 'abuser' and 'wife-beater'[1] as it was simply their honest opinion based on truth (s.2 Defamation Act 2013). This establishes a number of questions for the general public which are essential in understanding how institutions such as the media operate within the law.

Facts and decision

The case concerned articles published by Newsgroup Newspapers, specifically *The Sun*, regarding the headline and contents of an article posted about actor Johnny Depp after his appointment into the role of Grindelwald in the Fantastic Beasts franchise, which regarded his personal affairs with his ex-wife Amber Heard. The headline, originally dubbing Depp as a 'wife-beater', was changed approximately twelve hours after the article was published; however, the contents remained the same. Depp subsequently took legal action against Dan Wootton, the owner of Newsgroup newspapers, on the grounds of defamation. The Particulars of Claim[2] listed three major factors on which Depp wished to sue Wootton: the seriousness of the allegations made by Wootton against Depp; the extent and widespread reach of the publication; and the effect of such accusations of violence at the height of the Me Too movement.

Depp's initial action failed; the County Court. The High Court held in favour of the newspapers and held that it was fair for *The Sun* to describe Depp in this manner, stating that 'the defendants have shown that what they published in the meaning which I have held the words to bear was substantially true.'[3] Despite parts of Depp's argument proving the 'necessary elements of his cause of action in libel'[4] the judge weighed the defendants' arguments in their favour on the grounds that the words they used to describe Depp at the time of the article were true.

Analysis

Having decided on the issue of what consists of defamation in law, the Court held that as long as media outlets can prove that what they publish is true, they are allowed to use any language that they believe is appropriate, irrespective of the societal consequences of such publications. This has implications on the public interest; in the height of movements such as the Me Too[5] movement, it implies that speaking up about abuse being suffered can lead to ridicule and mockery by not only a small circle of people but potentially globally as long as newspapers believe what they publish to be true, and there are grounds for that belief.

This creates issues of distrust and uncertainty by the general public of media outlets, particularly for male victims of domestic, sexual and other types of abuse. The response to male victims of abuse

[1] https://www.thesun.co.uk/news/13090441/johnny-depp-libel-case-wife-beater/ accessed [18/11/2020]
[2] *Depp v Newsgroup Newspaper Ltd* [2020] EWHC 2911 (QB) [10]
[3] *Depp v Newsgroup Newspaper Ltd* [2020] EWHC 2911 (QB) [583]
[4] *Depp v Newsgroup Newspaper Ltd* [2020] EWHC 2911 (QB) [585]
[5] https://metoomvmt.org/ [accessed 19/11/2020]

appears to be lacking, and the involvement of the media appears to exacerbate this. Muller[6] demonstrates this, suggesting that law enforcement agents who were willing to provide information to female victims of domestic violence regarding restraining orders were not as willing to provide the same information to male victims experiencing identical abuse. In cases such as this, therefore, the role of the media becomes one of judgment as well as informational.[7] On the surface, it appears to allow the audience to form their own decisions; however, 'media effects can be a formative influence on consumer attitudes and behaviour'[8] suggesting a high level of control by newspaper editors, who thread their own opinions into the information published.

This decision thus calls into question the legal reach of the courts regarding libel cases, especially regarding domestic violence; if a private altercation between a victim and an abuser is publicised, regardless of who the victim is it can be incredibly damaging to the mental health of the victims while continuing to empower the perpetrator. The decision of the court, therefore, could be said to unbalanced in its view of freedom of speech of media outlets such as newspapers, when examined in a broader context.

[6] Muller at al (2009)
[7] Ramon et al (2000)
[8] Ray, L. (2011). *Violence and Society*. London, England

Oluwatomisin Makinde

R. v Lawrance (Jason) [2020] EWCA Crim 971

Introduction

This case raised a question on whether a lie about fertility could negate consent under s.74 of the Sexual Offences Act (SOA) 2003. Section 74 is taken into account in the interpretation of s.1 of the Act, which governs rape. The case commentary will begin by briefly stating the facts of the case, the decision, and the ratio. It will then examine and challenge the Court's decision on whether deception concerning a vasectomy pre-intercourse, should amount to rape and invalidate consent.

Facts and decision

The appellant (D) informed the complainant (L) over a dating website that he had undergone a vasectomy. He confirmed this when they met in person, which led to them having unprotected sex. The next day, D told L that he had lied about the vasectomy. Eventually, L discovered that she was pregnant and had an abortion. D was charged with two offences of rape and convicted on the grounds that L's consent was invalidated by his deception. However, D appealed on the basis that his deceit was not in sufficient proximity to the performance of sexual intercourse and therefore could not negate consent.

D's appeal was successful and it was held that his deception was incapable of vitiating consent.[1] The SOA s.76 incorporated two common law grounds into legislation, on which deceit would negate consent (identity and purpose of the act). However, this did not fall into any of the two categories. Cases such as *Assange v Sweden,*[2] *R.(on the application of Monica) v DPP,* [3] and other related cases were applied. In *Assange*, deceit was sufficient to vitiate consent as it related to sexual intercourse in actuality and not surrounding events.[4] Parliament had not included the concept of deceit to be applicable in situations where it was not sufficiently close to the performance of the sexual act, or fundamental enough to constitute impersonation. Although L had relied on D's deception and would not have consented without it, the 'but for' test was insufficient to invalidate consent. Under s.74, D's lie did not take away L's choice to have sex with him. The presence of an express deception did not matter, as in the related case of *R. v B,*[5] but the issue concerned the deception's proximity to the performance of the act.

Analysis

This decision may be problematic in the future. It is true that L had the freedom to choose whether to agree to the act, but parties do not usually expressly state what exactly they are agreeing to, and this creates a wide scope of reasonable belief in an agreement. However, where there has been a discussion on the prohibition or requirements of certain acts, in this case a vasectomy, then it can be argued that the scope of agreement should be narrowed. Additionally, the court does not explain what is meant by "physical performance of acts". It is important to bring this case to the knowledge of the public as there are many situations where a person can be tricked into consenting to a sexual act, and it appears that the law is inefficient in dealing with the possibilities of different scenarios. This could lead to unfair evasion of liability. Furthermore, the court also stated that express deception or failure to disclose information did not matter in relation to consent, as in the case of *R. v B*, which implies that a distinction was not made between the failure to disclose information and express deceptions. However, this is flawed, as this distinction seemed to be vital in *McNally.*[6]

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[1] Jonathan Rogers, 'R v Lawrance – The Right Outcome' (2020) 8 Arch. Rev. 4.
[2] [2011] EWHC 2849.
[3] [2018] EWHC 3508.
[4] Jonathan Rogers, 'R v Lawrance – The Right Outcome' (2020) 8 Arch. Rev. 4.
[5] [2006] EWCA Crim 2945.
[6] [2013] EWCA Crim 1051.

In conclusion, Parliament should be willing to widen the scope of deception under s.76 as more cases will arise which may not fall under that section, proving it to be too narrow in the long run. Furthermore, *Lawrance* concludes that the issue is "a matter of social and public policy"[7] and requires debate. This shows that Parliament needs to reconsider the issue and determine whether the exercise of choice is enough to overrule the failure to provide the right information to a party in order to make an informed decision. The Law Commission could review this issue and make a qualified analysis and relevant recommendations to the government, as the law needs to cover more scenarios of deception.

[7] Jonathan Rogers, 'R v Lawrance – The Right Outcome' (2020) 8 Arch. Rev. 4.

Ajay Chopra

Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4

Introduction

The case of *Robinson v Chief Constable of West Yorkshire Police* has made progressive steps regarding the duty of care owed by the police within the tort of negligence. This case established that the blanket immunity of police when acting within the scope of their core functions to be restricted. The controversy surrounding the present case was whether the police should be held liable for negligence towards anyone who experienced an injury caused by a third party as a result of a positive action on their behalf.

Facts and Decision

Mrs Robinson was a bystander in Huddersfield town centre where two police officers were attempting to arrest a drug dealer. The officers approached the drug dealer to arrest him, which he resisted and caused a struggle with the officers. These events caused a collision between Mrs Robinson and the officers in which Mrs Robinson fell to the ground causing her to become injured. She ultimately made a personal injury claim against West Yorkshire Police.

A Recorder considered the police to be negligent in their pursuit of the arrest, but felt that the case of *Hill v Chief Constable of West Yorkshire*[1] imposed an immunity on officers from negligence claims caused whilst arresting a suspect. Mrs Robinson appealed to the Court of Appeal, who believed the police owed no duty of care. They applied the three-stage test in *Caparo Industries Plc v Dickman,*[2] and felt that claims against the police would fail the third stage, believing the case to concern an omission. Mrs Robinson appealed to the Supreme Court.

In the Supreme Court, Lord Reed deemed the *Caparo* test unnecessary, as it is only used in novel cases and the use of previous cases were misinterpreted. Lord Reed believed that the officers failed to protect Mrs Robinson and "their actions resulted in her being injured."[3] The Supreme Court was in agreement that the case concerned a positive act rather than an omission, and concluded that the reasonably foreseeable risk of injury to Mrs Robinson during the arrest was sufficient to impose a duty of care towards the officers as they exposed her to danger.

Analysis

After this case, the police will now owe a duty of care towards someone who experienced direct harm from a positive action. Thus, the case is slowly eliminating, or at least restricting, the existence of the blanket immunity from negligence claims. This highlights that, in general, the police should be treated the same as everyone else, which, it might be argued, was never the case as the majority of personal injury claims against the police fail. Dicey stated that everyone "is under the same responsibility for every act done without legal justification as any other citizen"[4] implying the law treats everyone equally. The case of *Hill*[5] was rightfully distinguished as it concerned an omission, and the present case concerned a positive act. Conversely, in *Michael v Chief Constable of South Wales Police,*[6] Lord

[1] [1989] A.C. 53
[2] [1990] 2 A.C. 605
[3] *Ibid*, at para 73
[4] A.V. Dicey, *Introduction to the Study of the Law of the Constitution,* (3rd edition, London and New York, Macmillan and Co. Limited,1889), 181
[5] [1989] A.C. 53
[6] [2015] UKSC 2

Toulson believed that 'the common law does not generally impose liability for pure omissions'[7], implying that public bodies are not under a duty of care to stop the occurrence of harm.

The judgment in this case might cause the police to be more concerned about being sued rather than apprehending criminals. Consequently, the police may have to be more careful when making arrests, and how they make them, if the precedent in the current case is used. Additionally, human rights law might impose liability. In *Commissioner of Police of the Metropolis v DSD,*[8] victims who believed the state failed to conduct an appropriate investigation had the right to claim compensation from the state, as under article 3 of the European Convention on Human Rights, the state is required to conduct a proper investigation into crime. This implies that the police may receive more claims.

This case is of major importance to the public, as the duty of care owed to Mrs Robinson may affect the liability of the police regarding negligence in future cases. Additionally, it provides the public with optimism with respect to success in negligence claims against the police. The judgment of this case may leave this aspect of the law in an unclear position. Thus, the police cannot be sued in negligence for omissions, which has caused controversy, and this case failed to change the approach concerning omissions.

[7] Ibid, at para 97
[8] [2018] UKSC 11

Sean Mutiso

R. (on the application of Harrison) v Secretary of State for Justice [2020] EWHC 2096 (Admin)

Introduction

Marriage and religion are often connected, however not all who seek marriage hold religious views. This case explores the overlap between religion and law in marriage as in addition to possible reforms on the law of marriage in the UK.

Facts and decision

The claimants sought judicial review against the Secretary of State for Justice (SSJ), claiming the current law surrounding marriage, found in the Marriage Act 1949, discriminated against 'humanists'. They sought a declaration of incompatibility of that law because of the discrimination they experienced under article 14 of the European Convention on Human Rights 1950 with respect to their rights under article 8 (respect for private and family life, home and correspondence), Article 9 (freedom of thought, conscience and religion), and Article 12 (right to marry). The claimants were six couples who identified as humanist. They claimed that the law discriminated against them as it allowed them to legalise their marriages, but were unable to solemnize their marriage under a humanist wedding ceremony. Section 26 of the Act sets out the possibility of legalisation of religious marriages outside Part II.[1] The claimants argued that the Act does not incorporate humanist marriages into the Act, only allowing the civil partnership route to be used under s.26(1)(b) and (bb) of the 1949 Act.[2] One of the claimant couples, Ms Penny and Mr Bradley, had already undergone marriage through a civil partnership and they described it as "impersonal" and "uncomfortable" claiming that the state official described it as "their real marriage."

Judge Eady J used the questions asked in *R v Chief Constable of South Yorkshire*[3] in order to prove if unjustifiable discrimination occurred: did the issue fall within the one or more ambits of the HRA? The judge held that the claim fell within the ambit of article 9 following the decision in *Smith v Lancashire Teaching Hospitals NHS Foundation Trust.*[4] The judge then stated that it must also be asked whether there was a difference in treatment between the claimants and others put forward for comparison, and were those others in an analogous situation?*"* Section 26(1) (a), (c), (d) and (e) of the Marriage Act 1949 provided avenues to solemnization that were not available for humanists. The difference in treatment under article14's prescribed grounds was also present, as the article does not describe 'belief' as a prescribed ground; humanism falls within the 'other' prescribed ground. Finally, was the difference in treatment objectively justifiable? Following the test "manifestly without reasonable foundation" as employed in *R. v Secretary of State for the Home Department,*[5] this discrimination could be justified as the secretary sought a wholesale rather than a 'piecemeal' reform of the law. In conclusion, the judicial review was denied: even though discrimination was present, there had been a balance struck between the claimants' rights as well as the wider community.

Analysis

The case highlights the necessity of reform of the law on marriage. Marriage is a long-practised tradition with religious roots. However, places of worship have become more synonymous with marriage than religion. Britain has become more secularised, drawing away from organised religion; this is shown

[1] Part II Marriage Act 1949
[2] Section 26(1b)(bb) Marriage Act 1949
[3] *R. (on the application of S) v Chief Constable of South Yorkshire* [2004] UKHL 39
[4] *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916
[5] *R. (on the application of Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542

through the rise in identification of non-religious peoples from 31.4 per cent to 50.6 per cent between 1983 and 2013.[6] *Harrison* highlights the need for imminent reform of the law of marriage.

The Law Commissions paper proposed in 2015 - *Getting Married – A Consultation Paper on Wedding Law* - proposed some reforms highlighted in this case. One proposed reform related to what can constitute a religious group and the nomination process for marriage officiates. Following the 2013 Supreme Court definition of religion, we see that a religion would be described as "a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite."[7] Whilst society still draws from traditional religious forms, spirituality and personal 'beliefs' is on the increase, humanism being a prime example. Humanists describe themselves as "a non-religious worldview, and humanists are therefore either atheists or agnostics."[8] However, they still possess personal spiritual views. The law must adapt in order to be able to legalise marriages in an appropriate form, whilst respecting personal beliefs. The paper suggests that simply giving certain groups an ability to nominate officiants would not be beneficial, as shown in this case. The paper proposes that qualifying criteria should be provided for every religious organisation.[9] Nomination should also be extended to groups such as Humanist UK. In Scotland, humanist marriages are legal through a humanist ceremony, as any celebrant or belief body prescribed in secondary legislation is authorised to conduct weddings.[10]

Marriage is rooted as a covenant between God and humanity; however, this case highlights the possibility of a new type of covenant. An agreement between humanity without the need of a deity, a union based on an agreement between the two parties rather than a divine union. This case impacts not only the public's view on marriage, but also marriage in the eyes of the courts. Not only will marriage be changed in the law, but also as a concept mind in the public. From this, a number of questions are posed. First, what will the public's new view of marriage look like? The public's view of marriage has been defined mostly along the lines of religion. What will marriage look like when religion is removed as a factor? Second, what will marriage look like when places of worship are no longer synonymous with marriage? How will the courts respect individual unions whilst maintaining their legitimacy? Nevertheless, the case heralds the imminent transformation of marriage, not just in the law but as a practice in society.

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[6] British Social Attitudes Survey's 31st report

[7] *R (Hodkin) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77, [2014] AC 610 at [57], by Lord Toulson.

[8], *R. (on the application of Harrison) v Secretary of State for Justice* [2020] EWHC 2096 (Admin) [20].

[9] Law Commission Report 2015 – *A Consultation Paper on Wedding,* paragraph 5.93 *Getting Married*

[10] Marriage (Scotland) Act 1977, s.9

Alissa Schutten

R v Westwood [2020] EWCA Crim 598

Introduction

In this case, the Court of Appeal reviewed the full range of sentencing options available to a judge under the Mental Health Act 1983. They reviewed the earlier authorities as to the correct approach to applying these provisions and sentencing guidelines. This is an area of controversy, and prior judgments indicate that there is a lack of consistency in sentencing. The case of *Westwood* clarified the earlier decision in *Vowels,*[1] and raised the issue of whether to introduce a penal element in disposals regarding an offender who suffers from a mental disorder.

Facts and Decision

Westwood pleaded guilty to manslaughter by reason of diminished responsibility, based on his mental illness.[2] He was sentenced to an extended sentence of imprisonment with a limited hospital direction,[3] subject to special restrictions[4]. Judge Lockhart considered the appropriate sentencing that would "sufficiently protect the public." Therefore, he applied the decisions in *Edwards,*[5] and *Rendell.*[6] He concluded that Westwood "retained a medium to high level of responsibility for the offence" and thus, a "penal element" was deemed necessary.

On appeal, Westwood argued that the judge's decision was wrong in principle since it contradicted the unanimous opinion of the psychiatrists. Furthermore, the length of the custodial sentence was excessive. The Court of Appeal held that an order under s.37 with restrictions under s.41 would be more suitable on grounds of the guidelines from *Vowles.* Lord Justice Lindblom concluded that the appellant maintained a low level of "retained responsibility". This impacted the need for a "penal element" following the sentencing guidelines. It was held that an order under s.45A would risk further deterioration of Westwood's mental health, in contrast to an order under s.37, which would allow Westwood to remain in a secure inpatient unit for the foreseeable future. [7]

Analysis

This decision demonstrates that the courts should carefully weigh the impact of retained and diminished responsibility when determining liability for manslaughter. While judicial discretion is a key element of English law, it should be used with caution. Prior cases such as *Fisher,*[8] highlight the issue of the overuse of a penal element in the sentence. Psychiatric opinion should be highly persuasive, but all evidence should be considered when determining the correct sentencing.[9] Additionally, it reassures the public that in some instances hospital orders offer greater protection than prison sentences. A hospital order with restrictions under s.41 also puts more emphasis on rehabilitation.

The decision in *Westwood* demonstrates to the general public that their safety is of utmost importance to the court. However, the courts should carefully consider a distinction between whether the defendant's responsibility was diminished, and the extent to which responsibility was retained. This

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[1] *R v Vowels* [2015] EWCA Crim 45.
[2] Section 2 Homicide Act 1957.
[3] Section 45 Mental Health Act 1983.
[4] Ibid*,* s 41.
[5] [2018] EWCA Crim 595.
[6] [2019] EWCA Crim 621.
[7] Ibid.
[8] [2019] EWCA Crim 1066.
[9] *R v Blackman* [2017] EWCA Crim 190.

point was raised in *Rodi.*[10] However, in prior and subsequent cases the distinction was and has been less clear. For example, in *Henderson*[11] an individual received a hospital order in the Crown Court even when the facts were remarkably similar to *Westwood*. Lord Justice Davis stated that the new partial defence for diminished responsibility[12] related 'entirely to psychiatric matters'.[13] This might explain why there is a lack of consistency in the law, as judges are not medical experts and psychiatric opinion is not applied consistently. This inconsistency may impact the future application of the sentencing guidelines, as the courts will be considering an approach similar to *Vowels* after *Westwood* has clarified its guidelines.

The Courts should review whether their disposal meets the objectives of punishment, rehabilitation, and protection of the public in a fair and proportionate manner.[14] It is argued that *Westwood* was decided proportionally and fairly. However, we are confronted with the fact that the courts are inconsistent in their judgments, even when the facts are almost identical. The dilemma faced by the courts seems to revolve around determining the possibility of future risk presented by mentally disordered offenders to the public and correctly applying the sentencing guidelines.

[10] [2020] EWCA Crim 330.
[11] [2016] EWHC 3275 (QB).
[12] Section 52 Coroners and Justice Act 2009.
[13] *R v Brennan* [2014] EWCA Crim 2387.
[14] The Sentencing Council, 'Manslaughter by reason of diminished responsibility' (sentencingcouncil.org.uk, 1 November 2018) https://www.sentencingcouncil.org.uk/offences/crown-court/item/manslaughter-by-reason-of-diminished-responsibility/, accessed 20 November 2020.

Veerinder Sangar

Staffordshire Moorlands DC v Sanderson [2020] EWHC 962

Introduction

Sanderson is a criminal case concerning s.43(1) of the Anti-social Behaviour, Crime and Policing Act 2014, which states that a Community Protection Order (CPN) may be issued against an individual aged 16 or over. However, in this case, as the person was under 15 the CPN was issued against his mother instead. The court was required to determine whether it was possible for the authorities to issue a CPN to an individual (parent) concerning the conduct of a different individual (the child).

Facts and decision

In February 2019, the respondent was given a warning that stated that their conduct was affecting the quality of life of others in the locality. However, their anti-social behaviour continued, leading to the local authority issuing a community protection notice (CPN) to the respondent, on behalf of that person (as he was 15 years old). The mother appealed against the notice on the grounds that the CPN had been issued to the wrong person, subject to s.46 of the Anti-social Behaviour, Crime and Policing Act 2014. This was considered in the case of *Stannard v Crown Prosecution Service*,[1] whereby an individual has an opportunity to challenge the CPN by way of a s.46 appeal.

Decision

The case first went to the Magistrates Court where they allowed the appeal in favour of the mother (appellant). However, the council appealed against the decision of the court, and the case was heard in the Divisional Court. In dismissing the appeal, the Court concluded that the previous decision allowing the appeal was correct because the legislation did not permit CPN's to be issued in the name of an individual (parent) concerning the conduct of a different individual (child). Furthermore, it held that if Parliament had intended to enable a local authority to serve a CPN on a parent to require them to control the anti-social behaviour of a child and to face criminal penalties if they failed to do so, it could and would have made that clear; instead of using language which on its face only enables the local authority to serve a CPN on someone aged 16 or over in respect of their own anti-social behaviour.

Analysis

The decision can be seen as a step forward in restricting the use of CPN's. As we have seen in this case, third parties will not be liable for the actions of another individual whom they might have control over. Thus, the person who commits the conduct must be the one who is liable for any sort of punishment, as it is their actions that are seen to violate any public code. For example, a landlord should not take sole responsibility for any trouble caused by its occupiers. Another example is where a teacher cannot take responsibility, for the children in her class, for something that she would have not reasonably foreseen. It would be impractical to allow third parties to be liable for something that could not have foreseen and have control over. Furthermore, as stated in the judgment of the case, Parliament would have made clear, in their explanatory notes if its purpose was to enforce control over anti-social behaviour committed by another, irrespective of whether the person with responsibility, is a parent or not.

To conclude, this can be seen as a significant ruling as we can see that individuals with responsibility for another individual cannot be held *criminally* liable for their conduct if they did not contribute towards it. Moreover, local authorities will have to take greater care with issuing CPN's, considering every possibility of dealing with the situation and leading to a more thorough and better-handled procedure.

[1] [2019] EWHC 84 (Admin).

Christine Kamara

NP v A Local Authority [2020] EWCA Civ 1003

Introduction

The case *NP v A Local Authority* raised the legal issue of proportionality when a recorder had failed to consider the level of emotional harm that would have been caused on removing three children from their biological family. It also highlights the importance of handling cases with legal care during remote hearings.

Facts and decision

Three children had lived with their grandparents and their aunt for 18 months. Their father had taken them there due to the "chaotic lifestyle" they had suffered involving parental conflict and physical abuse. The children developed a bond with their aunt and grandparents and experienced a better life. After the local authority became involved, an interim care order was made for the children to remain with their grandparents; however due to allegations made by the father against the grandparents, the local authority sought removal of the children from their care. The mother and grandparents appealed this interim care order; and the local authority applied for a psychological assessment of the family; these were both refused.

On a second appeal by the mother and grandparents, the appeal was allowed, and the Court of Appeal decided that the removal of the children from their grandparent's care was disproportionate. This was because the recorder underestimated the severity of emotional harm that would be caused as a result of the separation and had not balanced the risks of leaving the children at home with the risk of removing them. Although the case of *Re C*[1] was mentioned, where it was held not to be proportionate to separate a child from his mother, Lord Justice Baker stated that the recorder did not apply this case with appropriate weight. Therefore, the emotional effects of removing the children from their grandparent's care were not analysed in enough detail. The Court also decided that it was necessary for a specialist to carry out a psychological assessment, as this case concerned "the impact of family conflict and dysfunctionality on the child's welfare", and would enable the court to understand the issue further.[2]

Analysis

It is argued that the decision in this case was fair, as the appeal court considered the emotional wellbeing of the children and saw the importance of a psychological assessment to assist the court in its final judgment. The decision was consistent with the previous case of *Re C*, where it was concluded that the recorder's decision to grant the separation was disproportionate, as he had considered previous events that had occurred, but had neglected to consider the impact of the separation on the development of the child.[3] Consequently, both cases demonstrate that proportionality plays a significant role in family law in determining whether a child stays with their family or whether they will be removed. This could reduce the number of children who are sent into foster care and separated from their families, as the courts are required to consider proportionality before granting an interim care order. Furthermore, the removal of children is a serious intrusion and interference with family life, violating article 8 of the European Convention on Human Rights. Thus, this case emphasises that any intervention of this right has to be proportionate to the aim of the intervention in family life, so as to prevent injustice. The general public should be aware of this ruling as it demonstrates the restrictions on the power of local authorities, and the protection that the law provided to families in this area.

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[1] *C (A Child) (Interim Separation), Re* [2019] EWCA Civ 1998, [2020]1 FLR 853.
[2] *NP* (n. 2).
[3] *C (A Child) (Interim Separation), Re* (n. 3).

Further, as this case was heard during the COVID-19 pandemic, it consisted of remote hearings where the recorder was given a series of case management decisions. It was important that he took specific care in analysing these applications, as this would determine whether an interim care order to remove the children from their grandparents would be appropriate. It can be argued that the recorder was not careful in his decision, as he had not considered whether it was both necessary and proportionate to separate the children from their grandparents. He also suggested that the children would not suffer much emotional harm due to their anticipation of the separation. However, this argument was invalid as there was insufficient evidence to support this conclusion. Therefore, it is crucial these cases are handled with care, so the judgment is fair, as there is no alternative method to remote hearings. This highlights the issues that are faced by the courts in dealing with urgent cases during this pandemic.

In conclusion this case suggests that proportionality is a key principle the courts need to consider when deciding whether to impose an interim care order. Furthermore, the general public should be aware of this case as it demonstrates the restrictions on the power of the local authority and the ability to challenge an interim care order where it is disproportionate.

Manisha Kumar

R (on the application of Bridges) v Chief Constable of South Wales Police [2020] EWCA Civ. 1058

Introduction

When the right to privacy conflicts with crime prevention, the law allows public authorities to interfere with this right if there is legal and necessary justification. This case is significant because it is the first to consider the use by the police of automated facial recognition (AFR) technology and its effect on privacy.[1]

Facts and decision

AFR used by South Wales Police (SWP) processes biometric data from the public, compares it to their watch list, and is deleted within 24 hours if no match is made. The claimant applied for judicial review as in 2017 and 2018 he was in public unaware that AFR was in use. The application was dismissed by the High Court, who were satisfied that the Data Protection Impact Assessment (DPIA) in s.64 of the Data Protection Act (DPA) and s.149 of the Public Sector Equality Duty (PSED) were not breached, and that any interference with Article 8(1) of the European Convention was justified.

The Court of Appeal allowed his appeal on three of the five grounds. First, he was successful in arguing that the Divisional Court had erred in concluding AFR was in accordance with law under Article 8(2). In the Court's view, the case of *Catt*[2] highlighted that the extent of police discretion must be clarified. Using this authority it was held there was no guidance and a broad discretion when AFR can be used, and who was on the watch list. Secondly, as DPIA is dependent on Article 8(2), it did not comply with s.64 of the Data Protection Act 2018. Thus, the appellant was successful in challenging SWP's compliance with PSED. Applying *R (Bracking)*[3] it was held reasonable steps had not been taken to determine whether there was any bias based on race or sex.

However, the appellant failed in arguing that AFR was not proportionate within Article 8(2). Considering *Bank Mellat,*[4] it was held the benefits of AFR were more important compared to his rights, so the interference would have justified had it been in accordance with law. The Court agreed with the Divisional Court, and declined to conclude whether SWP has an "appropriate policy document" within s.48 of the 2018 Act. This was because the events occurred in 2017 and 2018 when the DPA 1998 was still valid.

Analysis

While this modern technology is becoming necessary for modern crime prevention, the Court of Appeal balances this need with both public protection and privacy. This case is of public importance because it is clear the wide police discretion can have a disproportionate impact on certain communities. This technology had led to "higher false-positives"[5] for BAME faces than white, indicating a bias which is problematic as tensions between the police and BAME communities remain high since the Stephen Lawrence Inquiry Report.[6] The judgment highlights that PSED is important to "help to reassure

[1] Hugh Tomlinson Q.C, *"Use of Automatic Facial Recognition Technology Unlawful"*, Inform Blog, (August 2020)
[2] *R(Catt) v Association of Chief Police Office* [2015] UKSC 9
[3] *R(Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345
[4] *Bank Mellat v Her Majesty's Treasurer (No.2)* [2014] AC 700
[5] Chad Boutain, *"NIST Study Evaluates Effect of Race, Age and Sex on Face Recognition Software,* NIST, (December 2019)
[6] Paragraph 177 *R(on the application of Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058

members of the public that their interests have been taken into account."[7] It is the duty of a public authority to "promote equality and eliminate discrimination"[8] because a lack of ethnical responsibility can impact on public confidence in the police and other crime prevention technology.

Liberty lawyer Goulding describe*s this case "*a victory in the fight against facial recognition*"*[9] and it is noted the Court of Appeal indicated the importance of eradicating potential discrimination in AFR. However, the position of the Court remains unclear. Despite agreeing with the appellant that the interference with Article 8(2) is not in accordance with the law, because they disagreed with the claim regarding Article 8(1) - by holding it as proportionate - courts are likely to maintain the same position in the future; in other words, that the benefits from crime prevention are more significant than the right to privacy. Thus, the courts have left it unclear on the methods and limitations which can be imposed in order that AFR can operate legally. Further, the Court declined to rule whether primary legislation is needed in this area.[10]

This introduces a debate of whether AFR should remain in the UK. Angela Daly argues that the judgment does not mean the technology is illegal, but it must be used "with a clear, detailed, and proportionate legal framework."[11] This shows that she believes the use of the technology will be lawful when there are sufficient guidelines. In a similar vein, Professor Murray argues that the use of AFR must stop until an appropriate legal basis has been established, because currently it is not in accordance with the law.[12] Further, a Bill has been proposed to prohibit the use of automated facial recognition in public space and is being reviewed by the House of Lords,[13] indicating the lack of confidence the public and the legislature have in AFR. This case, therefore, recognises the necessity of clear police limits that must be placed on the use of this technology.[14]

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[7] Paragraph 172, *R(on the application of Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058

[8] Melissa Stock, "*R(Bridges) v The Chief Constable of South Wales Police [2020] EWCA Civ 1058 – a blog about privacy, data protection and information law",* Privacy Law Barrister, (August 2020)

[9] Megan Goulding, *"Liberty Wins Ground-Breaking Victory Against Facial Recognition Tech",* Liberty Human Rights, (August 2020)

[10] Jan Miller, *"Surveillance Technology Unlawful",* New Law Journal Article, (2020), 170 4(1)

[11] Rezzan Huseyin, "*Police Facial Recognition Use Unlawful - Landmark Ruling in UK*" P. & D.P. 2020, 20(8), 1,18

[12] "*New Report raises concerns over Metropolitan Police trials of live facial recognition technology",* University of Essex, (July 2019)

[13] Automated Facial Recognition Technology (Moratorium and review) Bill 86 [HL]

[14] Hugh Tomlinson Q.C, *"Use of Automatic Facial Recognition Technology Unlawful"*, Inform Blog, (August 2020)